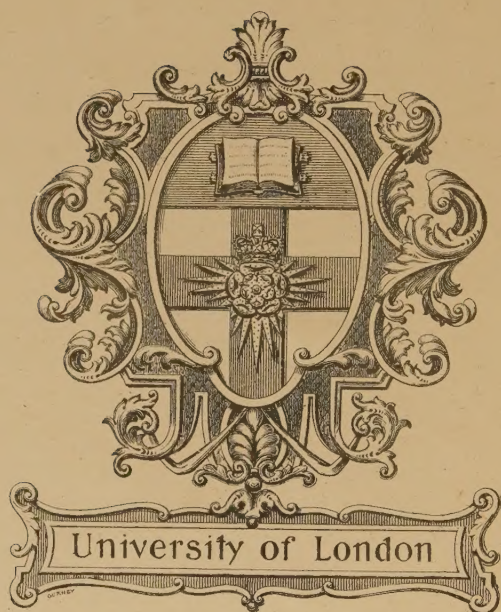
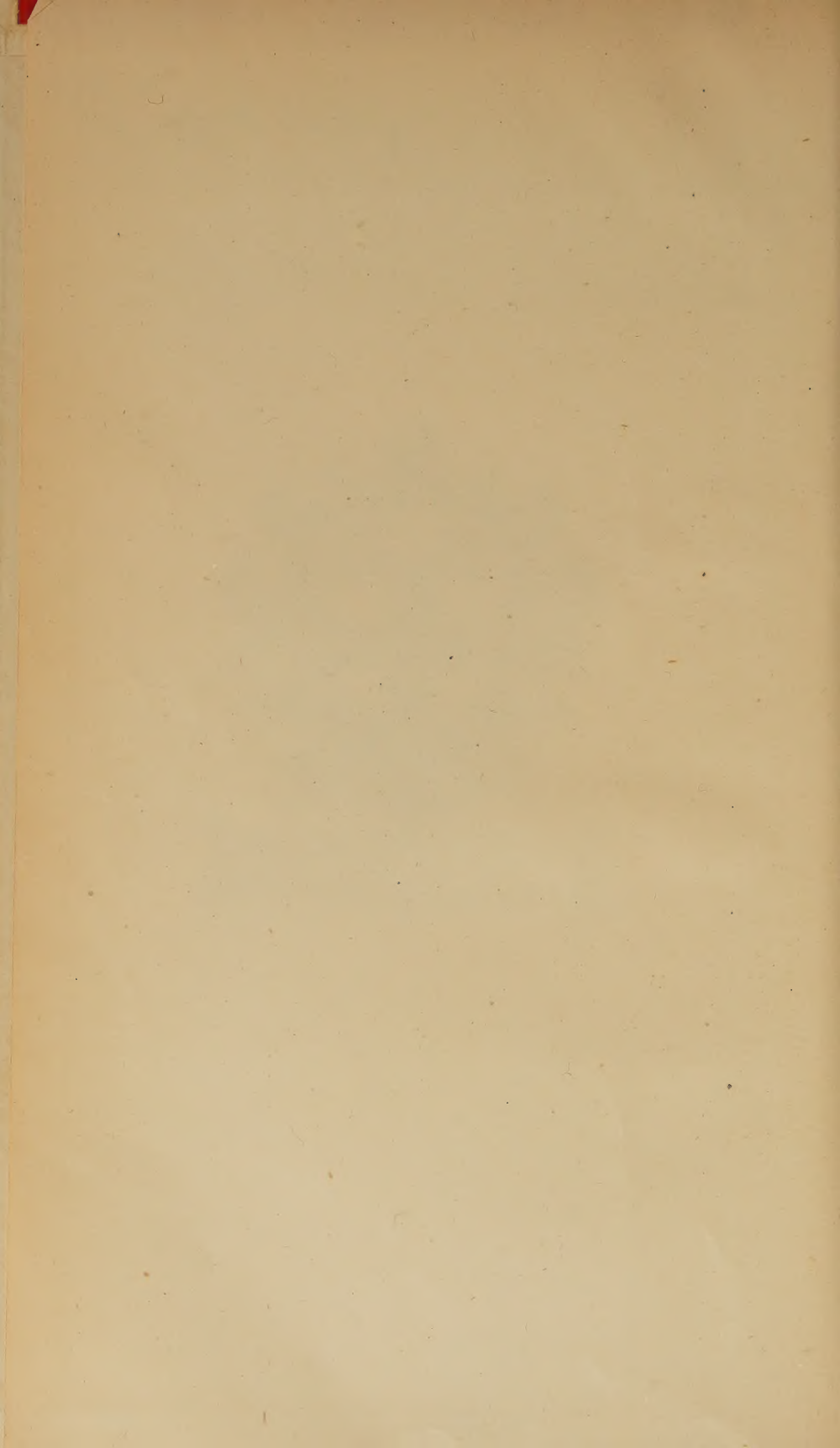


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LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL.
ALL DIVISIONS OF THE SUPREME COURT
AND
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CASES REPORTED IN VOLUME 1

	PAGE
ADDIE (ROBERT) & SONS COLLIERIES, LTD. v. MCALLISTER [H.L.]	676
ADDISON & CO., LTD., UNITED MOTOR FINANCE CO. v. [P.C.]	425
ADMIRALTY COMRS. v. VALVERDA (OWNERS) [C.A.]	49
AIRCRAFT INDUSTRIES CORPN., LTD., KAHN v. [K.B.D.]	757
AIRWORK, LTD., AND BRITISH-AMERICAN AIR SERVICES, LTD., FOSBROKE-HOBBS v. [K.B.D.]	108
ALLANSON, BARKER v. [C.A.]	75
ALLIANCE ASSURANCE CO., LTD., AUCKLAND CITY COUNCIL v. [P.C.]	645
ARROL (SIR WILLIAM) & CO., LTD., TAYLOR v. [K.B.D.]	658
A.-G. v. COHEN [C.A.]	27
A.-G., PUBLIC TRUSTEE v., Re HAMER'S ESTATE [CH. D.]	130
A.-G. OF MANITOBA, FORBES v. [P.C.]	249
AUCKLAND CITY COUNCIL v. ALLIANCE ASSURANCE CO., LTD. [P.C.]	645
BALLARDIE, UNION TRANSPORT FINANCE, LTD. v. [LEEDS AUTUMN ASSIZES]	420
BARBER v. PIDGEN [C.A.]	115
BARCLAY, JOEL v. [K.B.D. DIVL. CT.]	309
BARKER v. ALLANSON [C.A.]	75
BEARD, CULVER v. [C.A.]	301
BEER, MARSTRAND FISHING CO., LTD. v. [K.B.D.]	158
BRESLEY, RUSSELL v. [K.B.D. DIVL. CT.]	527
BRETHAM v. JAMES [K.B.D.]	580
BRENAO, SMITH v. [K.B.D. DIVL. CT.]	523
BERG v. SADLER & MOORE [C.A.]	637
BERRY v. GEEN, Re BLAKE [C.A.]	742
BETTY & TOM, LTD., SOUTHERN ESSEX ASSESSMENT COMMITTEE v. [K.B.D. DIVL. CT.]	461
BLACKMORE v. LIBERTY, Re LIBERTY'S WILL TRUSTS [CH. D.]	399
BLAKE, Re, BERRY v. GEEN [C.A.]	742
BLAUSTEIN v. MALTZ, MITCHELL & CO. [C.A.]	497
BLETCHLEY FLETCHONS, LTD., WALKER v. [K.B.D.]	170
BOAG v. STANDARD MARINE INSURANCE CO., LTD. [C.A.]	714
BODEY, JERRIM & DENNING, LTD. v. PENTIRION STEAMSHIP CO., LTD. [C.A.]	714
BOWEN v. INLAND REVENUE COMRS. [C.A.]	607
BOWKETT, PHILLIPS v., Re LEWIS'S WILL TRUSTS [CH. D.]	556
BOWMER, HURT v. [CH. D.]	797
BRITISH-AMERICAN AIR SERVICES, LTD., AIRWORK, LTD., AND, FOSBROKE-HOBBS v. [K.B.D.]	108
BRITISH MUTUAL BANKING CO., LTD., CARPENTERS OF THE CITY OF LONDON (WORSHIPFUL COMPANY OF) v. [K.B.D.]	183
BULL, KING v. [K.B.D. DIVL. CT.]	585
BULMER, Re GREAVES v. INLAND REVENUE COMMISSIONERS [C.A.]	323
BURGESS otherwise LEADBETTER v. BURGESS [DIV.]	374
BURNS v. GARSUDBE COLLIERY CO., LTD. [H.L.]	676
CAHILL v. LONDON CO-OPERATIVE SOCIETY, LTD. [CH. D.]	631
CANNOP COLLIERY CO., LTD. v. EXECUTIVE BOARD, Re FOREST OF DEAN DISTRICT (COAL MINES) SCHEME, 1930 [CH. D.]	82
CARPENTERS OF THE CITY OF LONDON (WORSHIPFUL COMPANY OF) v. BRITISH MUTUAL BANKING CO., LTD. [K.B.D.]	183
CATTERMOLE, REED v. [C.A.]	541
CAXTON PUBLISHING CO., LTD., SUTHERLAND PUBLISHING CO., LTD. (No. 2) [CH. D.]	338
CHAPLIN v. RUANE, Re MESSENGER'S ESTATE [CH. D.]	355

	PAGE
CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND STRAUSS & CO., LTD. (in Liquidation), MERCANTILE BANK OF INDIA, LTD. v. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO., LTD. (in Liquidation) [K.B.D.]	231
CHASTENEY v. NAIRN (MICHAEL) & Co., LTD. [K.B.D. DIVL. CT.]	376
CITY FUR MANUFACTURING CO., LTD. v. FURENBOND (BROKERS), LONDON, LTD. [K.B.D.]	799
CLAPSON, GREENWOOD TILERIES, LTD. v. [K.B.D.]	765
COATES v. RAWTENSTALL BOROUGH COUNCIL [K.B.D., MANCHESTER MICHAELMAS ASSIZES]	333
COHEN, A.-G. v. [C.A.]	27
COLLARD v. RIVER STOUR (KENT) CATCHMENT BOARD [K.B.D. DIVL. CT.]	436
COLWILL, LATTER v. [C.A.]	442
COURTAULDS, LTD., TURNER v. [K.B.D. DIVL. CT.]	467
CULVER v. BEARD [C.A.]	301
DEBTOE, Re A. No. 627 of 1936 [C.A.]	1
DELL, EVANS v. [K.B.D. DIVL. CT.]	349
DIAMANTIDI v. GROSVENOR SECURITIES, LTD., AND THE GUILDHALL TRUST, LTD. [C.A.]	703
DOBBIN v. WALDORF TOILET SALOONS, LTD. [K.B.D., MANCHESTER MICHAELMAS ASSIZES]	331
DRAKE SETTLEMENT TRUSTS, Re, WILSON v. DRAKE [CH. D.]	286
DRAKE, WILSON v., Re DRAKE SETTLEMENT TRUSTS [CH. D.]	286
EASTWOOD, FOGG v., Re EISER'S WILL TRUSTS [CH. D.]	244
ECKSTEIN, WILLOUGHBY v. (No. 2) [CH. D.]	257
EGGLETON v. HEAMON [K.B.D. DIVL. CT.]	538
EISER'S WILL TRUSTS, Re, FOGG v. EASTWOOD [CH. D.]	244
ELLIS v. FULHAM BOROUGH COUNCIL [K.B.D.]	698
EVANS v. DELL [K.B.D. DIVL. CT.]	349
EVERSHED v. GRIFFITHS, Re KEEN'S ESTATE [CH. D.]	452
EXECUTIVE BOARD, CANNOP COLLIERY CO., LTD. v., Re FOREST OF DEAN DISTRICT (COAL MINES) SCHEME, 1930 [CH. D.]	82
FARMER v. HYDE [C.A.]	773
FLATMAN v. OATEY [K.B.D. DIVL. CT.]	495
FLATMAN v. POOLE [K.B.D. DIVL. CT.]	495
FOGG v. EASTWOOD, Re EISER'S WILL TRUSTS [CH. D.]	244
FORBES v. A.-G. OF MANITOBA [P.C.]	249
FOREST OF DEAN DISTRICT (COAL MINES) SCHEME, 1930, Re, CANNOP COLLIERY CO., LTD. v. EXECUTIVE BOARD [CH. D.]	82
FOSBROKE-HOBBS v. AIRWORK, LTD., AND BRITISH-AMERICAN AIR SERVICES, LTD. [K.B.D.]	108
FREEMAN, WOOLF v. [K.B.D.]	178
FRYER v. SALFORD CORPORATION [C.A.]	617
FULHAM BOROUGH COUNCIL, ELLIS v. [K.B.D.]	698
FURENBOND (BROKERS) LONDON, LTD., CITY FUR MANUFACTURING CO., LTD. v. [K.B.D.]	799
GARNER MOTORS, LTD., Re [CH. D.]	671
GARSUDBE COLLIERY CO., LTD., BURNS v. [H.L.]	676
GEEN, BERRY v., Re BLAKE [C.A.]	742
GENERAL DAIRIES, LTD., MARITIME ELECTRIC CO., LTD. [P.C.]	748
GENERAL PRESERVING CO., LTD., Re [CH. D.]	693
GOSS v., WEBSTER, Re WEBSTER [C.A.]	602
GREAT WESTERN RY., HOPE v. [C.A.]	625
GREAVES v. INLAND REVENUE COMMISSIONERS, Re BULMER [C.A.]	323
GREEN v. KURSAAL (SOUTHEND-ON-SEA) ESTATES, LTD. [K.B.D.]	732

	PAGE
GREEN <i>v.</i> VANDEKAR [C.A.]	473
GREENWOOD TILERIES, LTD. <i>v.</i> CLAPSON [K.B.D.]	765
GRIFFITHS, EVERSHERD <i>v.</i> , <i>Re</i> KEEN'S ESTATE [CH. D.]	452
GROSVENOR HOUSE (PARK LANE), LTD., MILLENSTED <i>v.</i> [C.A.]	736
GROSVENOR SECURITIES, LTD., AND THE GUILDHALL TRUST, LTD., DIAMANTIDI <i>v.</i> [C.A.]	703
GUILDHALL INSURANCE CO., WYATT <i>v.</i> [K.B.D.]	792
GUILDHALL TRUST, LTD., GROSVENOR SECURITIES, LTD., & DIAMANTIDI <i>v.</i> [C.A.]	703
HALL'S SETTLEMENT TRUSTS, <i>Re</i> SAMUELL <i>v.</i> LAMONT [CH. D.]	571
HAMER'S ESTATE, <i>Re</i> PUBLIC TRUSTEE <i>v.</i> ATTORNEY-GENERAL [CH. D.]	130
HAYNE, SANDEMAN <i>v.</i> , <i>Re</i> SANDEMAN'S WILL TRUSTS [CH. D.]	368
HEAMON, EGGLETON <i>v.</i> [K.B.D. DIVL. CT.]	538
HEAMON, UNION CARTAGE CO. <i>v.</i> [K.B.D. DIVL. CT.]	538
HOPE <i>v.</i> GREAT WESTERN RY. [C.A.]	625
HUNT <i>v.</i> RICE & SON, LTD. [K.B.D.]	576
HURT <i>v.</i> BOWMER [CH. D.]	797
HYDE, FARMER <i>v.</i> [C.A.]	773
INLAND REVENUE COMRS., BOWEN <i>v.</i> [C.A.]	607
INLAND REVENUE COMMISSIONERS, GREAVES <i>v.</i> , <i>Re</i> BULMER [C.A.]	323
INLAND REVENUE COMRS. <i>v.</i> NEW SHARLSTON COLLIERIES CO., LTD. [C.A.]	86
IRON TRADES EMPLOYERS' INSURANCE ASSOCIATION <i>v.</i> UNION OF HOUSE AND LAND INVESTORS, LTD. [CH. D.]	481
JAMES, BEETHAM <i>v.</i> [K.B.D.]	580
JOEL <i>v.</i> BARCLAY [K.B.D., DIVL. CT.]	309
KAFIRISTAN, THE [C.A.]	40
KAHN <i>v.</i> AIRCRAFT INDUSTRIES CORPN., LTD. [K.B.D.]	757
KEEN'S ESTATE, <i>Re</i> EVERSHERD <i>v.</i> GRIFFITHS [CH. D.]	452
KENNS, LTD., WALKER <i>v.</i> [C.A.]	566
KETTELL, WILCOX <i>v.</i> [CH. D.]	222
KING <i>v.</i> BULL [K.B.D. DIVL. CT.]	585
KING ORRY (OWNERS) <i>v.</i> ROCKABILL (OWNERS) AND MERSEY DOCKS & HARBOUR BOARD, THE ROCKABILL [C.A.]	191
KORDA, KRONSTEIN <i>v.</i> [C.A.]	357
KROCH <i>v.</i> ROSSELL ET COMPAGNIE SOCIÉTÉ DES PERSONNES À RESPONSABILITÉ LIMITÉE [C.A.]	725
KROCH <i>v.</i> SOCIÉTÉ EN COMMANDITE PAR ACTIONS LE PETIT PARISIEN [C.A.]	725
KRONSTEIN <i>v.</i> KORDA [C.A.]	357
KURSAAL (SOUTHERN-ON-SEA) ESTATES, LTD., GREEN <i>v.</i> [K.B.D.]	732
LAMONT, SAMUELL <i>v.</i> , <i>Re</i> HALL'S SETTLEMENT TRUSTS [CH. D.]	571
LANCASHIRE COUNTY COUNCIL, ROCHDALE CORPORATION <i>v.</i> [K.B.D. DIVL. CT.]	559
LATTER <i>v.</i> COLWILL [C.A.]	442
LEACH, R. <i>v.</i> [C.C.A.]	319
LEICESTER COUNTY COUNCIL, NEWPORT BOROUGH COUNCIL <i>v.</i> [K.B.D. DIVL. CT.]	439
LEWINS, YOUNGER <i>v.</i> , <i>Re</i> ROBERT'S WILL TRUSTS [CH. D.]	518
LEWIS <i>v.</i> PLUNKET [CH. D.]	530
LEWIS, THOMAS <i>v.</i> [CH. D.]	137
LEWIS'S WILL TRUSTS, <i>Re</i> O'SULLIVAN <i>v.</i> ROBBINS [CH. D.]	227
LEWIS'S WILL TRUSTS, <i>Re</i> PHILLIPS <i>v.</i> BOWKETT [CH. D.]	556
LIBERTY'S WILL TRUSTS, <i>Re</i> BLACKMORE <i>v.</i> LIBERTY [CH. D.]	399
LINCOLNSHIRE SUGAR CO., LTD. (in Liquidation) <i>v.</i> SMART (H.M. INSPECTOR OF TAXES) [H.L.]	413
LONDON CO-OPERATIVE SOCIETY, LTD., CAHILL <i>v.</i> [CH. D.]	631
LONDON PASSENGER TRANSPORT BOARD, PRATT <i>v.</i> [C.A.]	473
MARITIME ELECTRIC CO., LTD. <i>v.</i> GENERAL DAIRIES, LTD. [P.C.]	748
MCALLISTER, ADDIE (ROBERT) & SONS COLLIERIES, LTD. <i>v.</i> [H.L.]	676
McMURRAY, WARMINGTONS <i>v.</i> [C.A.]	562
MADRID, THE [ADM.]	216
MALTZ, MITCHELL & CO., BLAUSTEIN <i>v.</i> [C.A.]	497

	PAGE
MARRIOTT <i>v.</i> MILLS, <i>Re</i> MILLS' WILL TRUSTS [CH. D.]	142
MARSTRAND FISHING CO., LTD. <i>v.</i> BEER [K.B.D.]	158
MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO., LTD. (in Liquidation), CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA <i>v.</i> MERCANTILE BANK OF INDIA, LTD. <i>v.</i> CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND STRAUSS & CO., LTD. (in Liquidation) [K.B.D.]	231
MERSEY DOCKS & HARBOUR BOARD, ROCKABILL (OWNERS) AND, KING ORRY (OWNERS) <i>v.</i> THE ROCKABILL [C.A.]	191
MESSINGER'S ESTATE, <i>Re</i> CHAPLIN <i>v.</i> RUANE [CH. D.]	355
METROPOLITAN WATER BOARD <i>v.</i> WATKINS [CH. D.]	489
MIDDLESEX COUNTY VALUATION COMMITTEE <i>v.</i> WEST MIDDLESEX ASSESSMENT AREA ASSESSMENT COMMITTEE [C.A.]	403
MILLENSTED <i>v.</i> GROSVENOR HOUSE (PARK LANE), LTD. [C.A.]	736
MILLS, MARRIOTT, <i>v.</i> , <i>Re</i> MILLS' WILL TRUSTS [CH. D.]	142
MINISTER OF TRANSPORT, R. <i>v.</i> , <i>Ex p.</i> VALLIANT DIRECT COACHES, LTD. [K.B.D. DIVL. CT.]	264
MOORE, SADLER & BERG <i>v.</i> [C.A.]	637
MOORSTONS, LTD., PINCOTT <i>v.</i> [C.A.]	513
MURPHY, WILSON <i>v.</i> [K.B.D. DIVL. CT.]	315
MUTUAL LOAN FUND ASSN., LTD. <i>v.</i> SANDERSON [K.B.D.]	380
NAIRN (MICHAEL) & CO., LTD., CHASTENEY <i>v.</i> [K.B.D. DIVL. CT.]	376
NEWPORT <i>v.</i> POUGHUR [C.A.]	276
NEWPORT BOROUGH COUNCIL <i>v.</i> LEICESTER COUNTY COUNCIL [K.B.D. DIVL. CT.]	439
NEW SHARLSTON COLLIERIES CO., LTD., INLAND REVENUE COMRS. <i>v.</i> [C.A.]	86
OATY, FLATMAN <i>v.</i> [K.B.D. DIVL. CT.]	495
OLDHAM ASSESSMENT COMMITTEE, TOWNLEY MILL CO. (1919), LTD. (in Voluntary Liquidation) <i>v.</i> [H.L.]	11
OPPENHEIMER <i>v.</i> LOUIS ROSENTHAL & CO. A.G. [C.A.]	23
OSMESLEY ESTATES, LTD., <i>Re</i> [CH. D.]	215
O'SULLIVAN <i>v.</i> ROBBINS, <i>Re</i> LEWIS'S WILL TRUSTS [CH. D.]	782
PENTIRION STEAMSHIP CO., LTD., BODEY, JERRIM & DENNING, LTD. <i>v.</i> [C.A.]	227
PHILLIPS <i>v.</i> BOWKETT, <i>Re</i> LEWIS'S WILL TRUSTS [CH. D.]	714
PINCOTT <i>v.</i> MOORSTONS, LTD. [C.A.]	556
PIDGEN, BARBER <i>v.</i> [C.A.]	513
PLUNKET, LEWIS <i>v.</i> [CH. D.]	115
POOLE, FLATMAN <i>v.</i> [K.B.D. DIVL. CT.]	530
POPULAR CATERING ASSOCIATION, LTD. <i>v.</i> ROMAGNOLI [K.B.D.]	495
POUGHUR, NEWPORT <i>v.</i> [C.A.]	167
PRATT <i>v.</i> LONDON PASSENGER TRANSPORT BOARD [C.A.]	276
PRICE <i>v.</i> REPRESENTATIVE BODY OF CHURCH IN WALES [CH. D.]	473
PUBLIC TRUSTEE <i>v.</i> ATTORNEY-GENERAL, <i>Re</i> HAMER'S ESTATE [CH. D.]	387
R. <i>v.</i> LEACH [C.C.A.]	130
R. <i>v.</i> MINISTER OF TRANSPORT, <i>Ex p.</i> VALLIANT DIRECT COACHES, LTD. [K.B.D. DIVL. CT.]	319
R. <i>v.</i> RAILWAY ASSESSMENT AUTHORITY, <i>Ex p.</i> SOUTHAMPTON CORPORATION [K.B.D. DIVL. CT.]	264
R. <i>v.</i> TRAFFIC COMMISSIONERS FOR THE SOUTH EASTERN TRAFFIC AREA, <i>Ex p.</i> VALLIANT DIRECT COACHES, LTD. [K.B.D. DIVL. CT.]	431
RAILWAY ASSESSMENT AUTHORITY, R. <i>v.</i> , <i>Ex p.</i> SOUTHAMPTON CORPORATION [K.B.D. DIVL. CT.]	481
RAMANAYAKE SOKALINGAM CHETTIAR <i>v.</i> [P.C.]	431
RAWNSTALL BOROUGH COUNCIL, COATES <i>v.</i> [K.B.D., MANCHESTER MICHAELMAS ASSIZES]	196
REED <i>v.</i> CATTERMOLE [C.A.]	333
RICE & SON, LTD., HUNT <i>v.</i> [K.B.D.]	541
ROBBINS, O'SULLIVAN <i>v.</i> , <i>Re</i> LEWIS'S WILL TRUSTS [CH. D.]	576
ROBERT'S WILL TRUSTS, <i>Re</i> YOUNGER <i>v.</i> LEWINS [CH. D.]	227
	518

	PAGE
ROCHDALE CORPORATION <i>v.</i> LANCASHIRE COUNTY COUNCIL [K.B.D. DIVL. CT.]	559
ROCKABILL, THE, KING ORRY (OWNERS) <i>v.</i> ROCKABILL (OWNERS) AND MERSEY DOCKS & HARBOUR BOARD, ROCKABILL (OWNERS) <i>v.</i> MERSEY DOCKS & HARBOUR BOARD [C.A.]	191
ROMAGNOLI, POPULAR CATERING ASSOCIATION, LTD. <i>v.</i> [K.B.D.]	167
ROSENTHAL (LOUIS) & CO. A.G., OPPENHEIMER <i>v.</i> [C.A.]	23 215
ROSSELL ET COMPAGNIE SOCIÉTÉ DES PERSONNES À RESPONSABILITÉ LIMITÉE, KROCH <i>v.</i> [C.A.]	725
RUANE, CHAPLIN <i>v.</i> , <i>Re</i> MESSENGER'S ESTATE [CH. D.]	355
RUSSELL <i>v.</i> BEESLEY [K.B.D. DIVL. CT.]	527
ST. PIERRE <i>v.</i> SOUTH AMERICAN STORES (GATH & CHAVES), LTD. [K.B.D.]	206
SADLER & MOORE, BERG <i>v.</i> [C.A.]	637
SALFORD CORPN., FRYER <i>v.</i> [C.A.]	617
SAMUELL <i>v.</i> LAMONT, <i>Re</i> HALL'S SETTLEMENT TRUSTS [CH. D.]	571
SANDEMAN'S WILL TRUSTS, <i>Re</i> , SANDEMAN <i>v.</i> HAYNE [CH. D.]	368
SANDERSON, MUTUAL LOAN FUND ASSN., LTD. <i>v.</i> [K.B.D.]	380
SHELDON <i>v.</i> SHELDON (TOWNLEY FORMERLY MURRAY INTERVENING) [DIV.]	779
SMART (H.M. INSPECTOR OF TAXES), LINCOLNSHIRE SUGAR CO., LTD. (in Liquidation) <i>v.</i> [H.L.]	413
SMITH <i>v.</i> BENABO [K.B.D. DIVL. CT.]	523
SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC, <i>Re</i> , THE APPLICATION OF THE [CH. D.]	145
SOCIÉTÉ EN COMMANDITE PAR ACTIONS LE PETIT PARISIEN, KROCH <i>v.</i> [C.A.]	725
SOCKALINGAM CHETTIAR <i>v.</i> RAMANAYAKE [P.C.]	196
SOMERVILLE (T.), RYAN & CO., LTD., <i>Re</i> AN APPLICATION BY [RLY. & CANAL COM.]	507
SOUTH AMERICAN STORES (GATH & CHAVES), LTD., ST. PIERRE <i>v.</i> [K.B.D.]	206
SOUTHAMPTON CORPORATION, <i>Ex p.</i> , R. <i>v.</i> RAILWAY ASSESSMENT AUTHORITY [K.B.D. DIVL. CT.]	431
SOUTHERN ESSEX ASSESSMENT COMMITTEE <i>v.</i> BETTY & TOM, LTD. [K.B.D. DIVL. CT.]	461
STANDARD MARINE INSURANCE CO., LTD., BOAG <i>v.</i> [C.A.]	714
STOUR RIVER (KENT) CATCHMENT BOARD, COLLARD <i>v.</i> [K.B.D. DIVL. CT.]	436
STRAUSS & CO., LTD. (in Liquidation), CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND, MERCANTILE BANK OF INDIA, LTD. <i>v.</i> CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA <i>v.</i> MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO., LTD. (in Liquidation) [K.B.D.]	231

	PAGE
SUTHERLAND PUBLISHING CO., LTD. <i>v.</i> CAXTON PUBLISHING CO., LTD. (No. 2) [CH. D.]	338
TAYLOR <i>v.</i> SIR WILLIAM ARROL & CO., LTD. [K.B.D.]	658
TAYLOR <i>v.</i> TAYLOR [K.B.D.]	464
TAYLOR <i>v.</i> WEBB [C.A.]	590
THOMAS <i>v.</i> LEWIS [CH. D.]	137
TOWNLEY MILL CO. (1919), LTD. (in Voluntary Liquidation) <i>v.</i> OLDHAM ASSESSMENT COMMITTEE [H.L.]	11
TRAFFIC COMMISSIONERS FOR THE SOUTH EASTERN TRAFFIC AREA, R. <i>v.</i> , <i>Ex p.</i> VALLIANT DIRECT COACHES, LTD. [K.B.D. DIVL. CT.]	264
TURNER <i>v.</i> COURTAULDS, LTD. [K.B.D. DIVL. CT.]	467
UNION CARTAGE CO. <i>v.</i> HEAMON [K.B.D. DIVL. CT.]	538
UNION OF HOUSE AND LAND INVESTORS, LTD., IRON TRADE EMPLOYERS' INSURANCE ASSOCIATION <i>v.</i> [CH. D.]	481
UNION TRANSPORT FINANCE, LTD. <i>v.</i> BALLARDIE [LEEDS AUTUMN ASSIZES]	420
UNITED MOTOR FINANCE CO. <i>v.</i> ADDISON & CO., LTD. [P.C.]	425
VALLIANT DIRECT COACHES, LTD., <i>Ex p.</i> R. <i>v.</i> MINISTER OF TRANSPORT, R. <i>v.</i> TRAFFIC COMMISSIONERS FOR THE SOUTH EASTERN TRAFFIC AREA, <i>Ex p.</i> VALLIANT DIRECT COACHES, LTD. [K.B.D. DIVL. CT.]	264
VALVERDA (OWNERS), ADMIRALTY COMRS. <i>v.</i> [C.A.]	49
VANDEKAR, GREEN <i>v.</i> [C.A.]	473
WALDORF TOILET SALOONS, LTD., DOBBIN <i>v.</i> [K.B.D., MANCHESTER MICHAELMAS ASSIZES]	331
WALES, REPRESENTATIVE BODY OF CHURCH IN, PRICE <i>v.</i> [CH. D.]	387
WALKER <i>v.</i> BLETCHLEY FLETTONS, LTD. [K.B.D.]	170
WALKER <i>v.</i> KENNS, LTD. [C.A.]	566
WARMINGTONS <i>v.</i> McMURRAY [C.A.]	562
WATKINS, METROPOLITAN WATER BOARD <i>v.</i> [CH. D.]	489
WEBB, TAYLOR <i>v.</i> [C.A.]	590
WEBSTER, <i>Re</i> , GOSS <i>v.</i> WEBSTER [C.A.]	602
WEST MIDDLESEX ASSESSMENT AREA ASSESSMENT COMMITTEE, MIDDLESEX COUNTY VALUATION COMMITTEE [C.A.]	403
WHITE (ORSE) BENNETT <i>v.</i> WHITE [DIV.]	708
WILCOX <i>v.</i> KETTEL [CH. D.]	222
WILLOUGHBY <i>v.</i> ECKSTEIN (No. 2) [CH. D.]	257
WILSON <i>v.</i> DRAKE, <i>Re</i> DRAKE SETTLEMENT TRUSTS [CH. D.]	286
WILSON <i>v.</i> MURPHY [K.B.D. DIVL. CT.]	315
WOOLF <i>v.</i> FREEMAN [K.B.D.]	178
WYATT <i>v.</i> GUILDHALL INSURANCE CO., LTD. [K.B.D.]	792
YOUNGER <i>v.</i> LEWINS, <i>Re</i> ROBERTS'S WILL TRUSTS [CH. D.]	518

CASES REFERRED TO

	PAGES
Abbott v. St. John City (1908), 40 S.C.R. 597; 17 Digest 436, case j	250, 254
Abrahams, <i>Re</i> , Abrahams v. Abrahams, [1908] 2 Ch. 69; 23 Digest 439, 5083	245, 247
Addie (R.) & Sons (Collieries) v. Dumbreck, [1929] A.C. 358; Digest Supp.	
Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd., [1934] A.C. 122; Digest Supp.	333, 335, 336, 337, 698, 699, 700
Admiralty Comrs. v. Page, [1919] 1 K.B. 299; 39 Digest 317, 11	207, 209, 645, 646, 647, 653, 654, 655, 656, 657
Admiralty Comrs. v. S.S. Chekiang, [1926] A.C. 637; 41 Digest 805, 6663	50, 51
Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna, [1926] A.C. 655; 41 Digest 802, 6624	50, 53
Aitchison v. Lohre (1879), 4 App. Cas. 755; 29 Digest 236, 1899	41, 42
Akerman, <i>Re</i> , Akerman v. Akerman, [1891] 3 Ch. 212; 23 Digest 439, 5085	158, 159
Alexander v. Rayson, [1936] 1 K.B. 169; Digest Supp.	245, 248
Allen v. Whitehead, [1930] 1 K.B. 211; Digest Supp.	637, 639, 642, 643
Alma, The, (1861), 1 Lush. 378; 39 Digest 320, 47	316, 318
Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. 87; 43 Digest 93, 963	50, 51
Antil v. Manufacturers' Life Insurance Co., [1899] A.C. 604; 29 Digest 350, 2835	631, 636
Anderson, Ltd. v. Daniel, [1924] 1 K.B. 138; Digest Supp.	748, 754
Andrew v. Macklin (1865), 6 B. & S. 201; 5 Digest 1191, 9621	197
Angrove v. Tippet (1865), 11 L.T. 708; 26 Digest 241, 1833	671, 673
"Apollinaris" Trade Mark, <i>Re</i> , [1907] 2 Ch. 178; 24 R.P.C. 436; 43 Digest 154, 127	2, 3
Apted v. Apted & Bliss, [1930] P. 246; Digest Supp.	146, 148
Archer (H.M.S.), [1919] P. 1; 41 Digest 796, 6553	779, 781
Aronson v. Liverpool Corp'n. (1913), 77 J.P. 176; 32 Digest 545, 1984	191, 192
Arpad, The, [1934] P. 189; Digest Supp.	50, 53
Ash v. Dickie, [1936] Ch. 655; [1936] 2 All E.R. 71; Digest Supp.	339, 340, 341, 347, 348
Ash v. Hutchinson & Co. (Publishers), Ltd., [1936] Ch. 489; [1936] 2 All E.R. 1496; Digest Supp.	339, 340, 342, 343
Ashwell & Nesbit, Ltd. v. Allen & Co. (1912), 2 Hudson's B.C., 4th Edn., 462; 7 Digest 424, 364	703, 704
Atkinson v. Newcastle & Gateshead Waterworks Co. (1877), 2 Ex. D. 441; 38 Digest 56, 330	766
A.-G. v. Baker (1859), 4 H. & N. 19; 21 Digest 92, 678	286, 289
A.-G. v. Floyer (1862), 9 H. L. Cas. 477; 21 Digest 86, 622	286, 289, 290, 291, 292, 298, 299
A.-G. v. Mallock (1931), 146 L.T. 344; Digest Supp.	507, 508
A.-G. v. Maule (1886), 56 L.T. 611; 21 Digest 92, 675	286, 290
A.-G. v. Smythe (1862), 9 H.L. Cas. 497; 21 Digest 95, 697	286, 298
A.-G. v. Tomline (1880), 14 Ch. D. 58; 44 Digest 79, 606	766
A.-G. v. Walkergate Press, Ltd., A.-G. v. Bloomfield, A.-G. v. Carlton (1930), 142 L.T. 408; Digest Supp.	733, 734
A.-G. for Ireland v. Rathdonnell (1893), 32 L.R. Ir. 574; 21 Digest 91, 670 i	286, 291
A.-G. for Manitoba v. A.-G. for Canada, [1925] A.C. 561; Digest Supp.	250
Australian Direct Steam Navigation Co., <i>Re</i> , Miller's Case (1877), 5 Ch. D. 70; 9 Digest 453, 2943	736, 738
Australasian Temperance & General Assurance Corporation, Ltd. v. Mount Albert Borough Council, [1936] N.Z.L.R. 54	646, 657
Badeock v. Cumberland Gap Park Co., [1893] 1 Ch. 862; 13 Digest 429, 1528	216, 217
Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz (1903), 88 L.T. 490 on appeal (1904), 90 L.T. 733; 36 Digest 776, 2563	725, 726, 727
Bailey (William) (Birmingham), Ltd., <i>Re</i> , Application to Register a Trade Mark, <i>Re</i> Gilbert & Co.'s Opposition (1935), 52 R.P.C. 136; Digest Supp.	146, 148
Banham (George) & Co. v. Reddaway (F.) & Co., [1927] A.C. 406; 44 R.P.C. 27; 43 Digest 183, 337	145, 157
Bank of New South Wales v. O'Connor (1889), 14 App. Cas. 273; 35 Digest 610, 3475	530, 531
Bank of Toronto v. Lambe (1887), 12 App. Cas. 575; 17 Digest 435, 136	250, 254, 256
Bankruptcy Notice, <i>Re</i> A., [1924] 2 Ch. 76; Digest Supp.	749, 755
Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency, [1919] A.C. 304; 32 Digest 113, 1453	773, 774, 776
Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd. (1932), 48 C.L.R. 391	646, 647
Bassett's Estate, <i>Re</i> , Perkins v. Fladgate (1872), L.R. 14 Eq. 54; 44 Digest 837, 6912	355, 357
Bastin v. Bidwell (1881), 18 Ch.D. 238; 31 Digest 75, 2209	590, 591
Batard v. Hawes, Batard v. Douglas (1853), 2 E. & B. 287; 26 Digest 145, 1080	1, 2, 6, 8
Batt's Trade Mark, <i>Re</i> , (1889), 6 R.P.C. 493; 43 Digest 146, 73	146, 148
Baynham, <i>Re</i> , Hart v. Mackenzie (1891), 7 T.L.R. 587; 44 Digest 843, 6957	556
Beaumont, <i>Re</i> , Bradshaw v. Packer, [1913] 1 Ch. 325; 40 Digest 517, 617	571, 572
Behrens v. Richards, [1905] 2 Ch. 614; 44 Digest 77, 584	765, 767, 770
Benning v. Ilford Gas Co., [1907] 2 K.B. 290; Digest, Practice, 874, 4158	116, 129
Bentley, <i>Re</i> , Public Trustee v. Bentley, [1914] 2 Ch. 456; 43 Digest 1035, 4761	518, 519, 520
Berkeley Peerage Case (1811), 4 Camp. 401; 3 Digest 368, 91	131, 133
Berna Commercial Motors, Ltd.'s, Application, <i>Re</i> , (1915), 32 R.P.C. 113	145, 147, 149
Beta, The, (1884), 9 P.D. 134; 41 Digest 850, 7131	41, 44, 48
Bettini v. Gye (1876), 1 Q.B.D. 183; 12 Digest 424, 3408	590, 591
Bickerton v. Burrell (1816), 5 M. & S. 383; 1 Digest 621, 2468	637, 638
Biddle v. Bond (1865), 6 B. & S. 225; 3 Digest 101, 287	498, 501, 503, 504, 505, 506
Bilbao, The, (1860), Lush. 149; 41 Digest 972, 8632	191, 192, 193
Bissell & Co. v. Fox Brothers & Co. (1885), 53 L.T. 193; 3 Digest 238, 666	184, 187, 188, 189, 190

	PAGES
Blackwell v. Blackwell, [1929] A.C. 318; Digest Supp.	453, 454, 455, 457, 458, 459, 460
Bloomenthal v. Ford, [1897] A.C. 156; 9 Digest 313, 1949	749, 756
Blount v. Blount, [1916] 1 K.B. 230; 28 Digest 68, 356	465
Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co., [1931] 2 K.B. 334; Digest Supp.	765, 767, 770
Bodega Co., Ltd., Re, [1904] 1 Ch. 276; 9 Digest 526, 3465	566
Bombay, The, (1832), 3 Hag. Adm. 148, n.; 41 Digest 941, 8318	50, 51
Boord & Son, Incorporated v. Bagots, Hutton & Co., Ltd., [1916] 2 A.C. 382; 33 R.P.C. 357; 43 Digest 163, 199	146, 149
Borwick v. Southwark Corp., [1909] 1 K.B. 78; 38 Digest 426, 16	11, 12, 17
Bottomley v. Woolworth (F. W.) & Co., Ltd. (1932), 48 T.L.R. 521; Digest Supp.	301, 303, 307
Boulton v. Hunt (1913), 77 J.P. 337; 25 Digest 447, 406	309, 313, 314
Boyes, Re, Boyes v. Carritt (1884), 26 Ch. D. 531; 43 Digest 601, 487	452, 453, 455, 456, 459
Boynton v. Ancholme Drainage & Navigation Comrs., [1921] 2 K.B. 213; 41 Digest 57, 412	766
Bradfield, Re, Bradfield v. Bradfield, [1914] W.N. 423; 44 Digest 722, 5722	142, 143, 144
Bradshaw v. McMullan, [1920] 2 I.R. 412; 21 Digest 139, case h	749, 755
Brand v. Sandground (1901), 85 L.T. 517; 36 Digest 489, 1542	276, 278
Bray v. Ford, [1896] A.C. 44; 32 Digest 164, 1988	773, 774, 776
Braybrooke (Lord) v. A.-G. (1861), 9 H. L. Cas. 150; 21 Digest 94, 694	286, 290, 291, 298, 299
Brereton v. Edwards (1888), 21 Q.B.D. 488; 21 Digest 653, 2314	276, 278
British India Steam Navigation Co. v. Inland Revenue Comrs. (1881), 7 Q.B.D. 165; 6 Digest 500, 3172	232, 233
Brittain v. Lloyd (1845), 14 M. & W. 762; 12 Digest 520, 4325	1, 2, 8
Broken Hill Proprietary Co., Ltd. v. Latham, [1933] Ch. 373; Digest Supp.	646, 647
Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros., [1936] 3 All E.R. 696; Digest Supp.	2, 10
Brown v. Thornton (1837), 6 Ad. & El. 185; 11 Digest 488, 1402	207, 203
Browne, Re, Ex p. Martingell, [1904] 2 K.B. 133; 25 Digest 402, 63	442, 448
Bruce v. Jones (1863), 1 H. & C. 769; 29 Digest 122, 747	714, 724
Bruiton v. Birch (1853), 1 Eq. Rep. 136; 23 Digest 213, 2521	474
Brusnick (Duke) v. Harmer (1849), 14 Q.B. 185; 32 Digest 342 248	726
Bubb v. Yelverton (1870), L.R. 9 Eq. 471; 25 Digest 400, 55	442, 445
Bullock, Re, Good v. Lickorish (1891), 60 L.J. Ch. 341; 43 Digest 787, 2267	245, 247
Burford (H. G.) & Co.'s Application, Re, [1919] 2 Ch. 28; 36 R.P.C. 139; 43 Digest, 149, 92	146, 148
Burkinshaw v. Nicolls (1878), 3 App. Cas. 1004; 9 Digest 314, 1953	749, 755, 756
Burland v. R., Allyn v. Barthe, [1922] 1 A.C. 215; 17 Digest 436, 142	250
Bwlfa & Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co., [1903] A.C. 426; 11 Digest 129, 186	414, 419
Calypso, The, (1828), 2 Hag. Adm. 209; 41 Digest 823, 6816	50, 51
Campbell (Donald) & Co. v. Pollak, [1927] A.C. 732; Digest, Practice, 855, 4004	301, 302
Capella, The, (Cargo Ex) (1867), L.R. 1 A. & E. 356; 41 Digest 850, 7133	40, 42, 44, 46, 47
Capital & Counties Bank, Ltd. v. Gordon, London, City & Midland Bank, Ltd. v. Gordon, [1903] A.C. 240; 3 Digest 239, 670	184, 187, 188, 189
Carlton Hall Club v. Laurence, [1929] 2 K.B. 153; Digest Supp.	178, 180
Carmichael v. Gee (1880), 5 App. Cas. 588; 23 Digest 423, 4936	607, 615
Caron v. R., [1924] A.C. 999; Digest Supp.	250, 254
Carpue v. London & Brighton Ry. Co. (1844), 5 Q.B. 747; 38 Digest 110, 790	108, 110
Carr v. London & North Western Ry. Co. (1875), L.R. 10 C.P. 307; 21 Digest 288, 1020	748, 752
Cassel, Re, Public Trustee v. Mountbatten, [1927] 2 Ch. 275; Digest Supp.	518, 519
Cassella (Leopold) & Co., Re, [1910] 2 Ch. 240; 27 R.P.C. 453; 43 Digest 143, 54	146, 149
Chaplin v. Smith, [1926] 1 K.B. 198; 31 Digest 376, 5228	513, 516
Charlotte Wylie, The, (1846), 2 Wm. Rob. 495; 39 Digest 319, 33	50, 51
Charlottetown (City) of v. Foundation Maritime, Ltd. (1932), S.C.R. 589; Digest Supp.	250
Chatenay v. Brazilian Submarine Telegraph Co., [1891] 1 Q.B. 79; 17 Digest 331, 1424	207, 208
Cherry v. Thompson (1872), L.R. 7 Q.B. 573; Digest Supp.	23, 24
Chesebrough's Trade Mark "Vaseline," Re, [1902] 2 Ch. 1; 43 Digest 178, 316	146, 147
China Navigation Co., Ltd. v. A.-G., [1932] 2 K.B. 197; Digest Supp.	50, 51
Citizens Insurance Co. of Canada v. Parsons, Queen Insurance Co. v. Parsons (1881), 7 App. Cas. 96; 17 Digest 436, 145	250, 256
Clack v. Clack, [1935] 2 K.B. 109; Digest Supp.	465
Clark, Son & Morland, Ltd.'s, Trade Mark, Re, [1936] 2 All E.R. 1125; 53 R.P.C. 413; Digest Supp.	146, 148
Clarke v. Watson (1865), 18 C.B.N.S. 278; 7 Digest 363, 125	703
Clayton v. Clayton, [1930] 2 Ch. 12; Digest Supp.	530, 531, 535, 536
Coates v. Rawtenstall Borough Council, [1937] 1 All E.R. 333; Digest Supp.	698, 699
Coats (J. & P.), Ltd.'s, Application, Re, [1936] 2 All E.R. 975; 53 R.P.C. 355; Digest Supp.	145, 147, 148, 149, 154, 157
Codling v. Mowlem (J.) & Co., Ltd., [1914] 3 K.B. 1055; 34 Digest 491, 4067	658, 659, 665, 668
Cohen (G.), Sons & Co. v. Standard Marine Insurance Co., Ltd. (1925), 41 T.L.R. 232; 29 Digest 188, 1457	158, 164
Coleman, Re, Henry v. Strong (1888), 39 Ch. D. 443; 44 Digest 1100, 9492	245, 248
Collinge v. Heywood (1839), 9 Ad. & El. 633; 26 Digest 241, 1881	2, 3, 6
Collins v. Blantern (1767), 2 Wils. 341; 12 Digest 260, 2122	637, 642
Cook v. Imperial Tobacco Co., [1922] 2 K.B. 158; 13 Digest 485, 352	301, 303, 307
Cooper, Re, Cooper v. Vesey (1882), 20 Ch. D. 611; 38 Digest 743, 883	530, 531
Corke v. Fry (Inland Revenue v. Fry) (1895), 3 Tax Cas. 335; 23 Digest 87, case n	542, 551, 553
Cotton v. R., [1914] A.C. 176; 17 Digest 436, 141	250
Coulson & Purley Urban District Council v. Surrey County Council, [1934] Ch. 694; Digest Supp.	404, 405
County Life Assurance Co., Re, (1870), 5 Ch. App. 288; 9 Digest 629, 4167	232, 238
Coventry v. Great Eastern Ry. Co. (1883), 11 Q.B.D. 776; Digest Supp.	50, 53
Cowley v. Newmarket Local Board, [1892] A.C. 345; 26 Digest 400, 1251	765, 767, 770
Cox v. Taylor (1853), 1 Eq. Rep. 122; 23 Digest 213, 2520	474

	PAGES
Crampton v. Walker (1860), 3 E. & E. 321; 26 Digest 138, 1021	2, 10
Croft v. Dunphy, [1933] A.C. 156; Digest Supp.	250, 256
Crosfield (J.) & Sons, Ltd., Re, [1910] 1 Ch. 130; 26 R.P.C. 837; 43 Digest 153, 114	146, 152
Crow v. Tyrrell (1818), 3 Madd. 179	530, 535, 536
Croxford v. Universal Insurance Co., Ltd., Norman v. Gresham Fire & Accident Insurance Society, Ltd., [1936] 1 All E.R. 151; Digest Supp.	116, 117
Curtis & Betts, Re, [1887] W.N. 126; 23 Digest 213, 2576	474, 476, 477, 479
Curtius v. Caledonian Fire & Life Insurance Co. (1881), 19 Ch. D. 534; 23 Digest 213, 2523	474, 478
Cybele, The, (1878), 3 P.D. 8; 39 Digest 316, 7	50, 51
Cynthia, The, (1876), 2 P.D. 52; 41 Digest 787, 6478	191, 192
Dalhousie, The, (1875), 1 P.D. 271, n.; 39 Digest 320, 48	50, 51
Dane v. Mortgage Insurance Corp., [1894] 1 Q.B. 54; 10 Digest 1054, 7372	671, 673, 674, 675
Davies v. Davies (1888), 38 Ch. D. 499; 31 Digest 357, 5016	590, 591
Davis v. Parker, [1931] 2 K.B. 210; Digest Supp.	179, 180
Dawkins v. Saxe Weimar (Prince Edward), Dawkins v. Wynyard, Dawkins v. Stephenson (1876), 1 Q.B.D. 499; 38 Digest 79, 566	216, 218, 220
Dawson v. Dyer (1833), 5 B. & Ad. 584; 31 Digest 125, 2589	590, 591
Dean v. Gibson (1867), L.R. 3 Eq. 713; 44 Digest 594, 4181	142
Dean v. Hornby (1854), 3 E. & B. 180; 29 Digest 220, 1764	158, 159, 164
De Bêche v. South American Stores, Ltd., & Chilean Stores, Ltd., [1935] A.C. 148; Digest Supp.	206, 207
Debor, Re A., [1901] 2 K.B. 354; 4 Digest 168, 1575	671, 673
Delegat v. Highley (1837), 3 Bing. N.C. 950; 32 Digest 135, 1663	773, 774
DeLoitte, Re, Grinths v. DeLoitte, [1926] Ch. 56; 37 Digest 149, 752	742, 743, 747
Derry v. Peck (1889), 14 App. Cas. 337; 35 Digest 27, 185	425, 426, 428
Deutsche Bank (London Agency) v. Berire & Co. (1895), 73 L.T. 669; 21 Digest 313, 1154	749, 750
Devaynes v. Noble, Clayton's Case (1816), 1 Mer. 529, 572; 12 Digest 483, 3961	227, 228
Dixon v. Hamond (1819), 2 B. & Ald. 310; 1 Digest 455, 1430	498, 503
Dobson v. Jones (1844), 5 Man. & G. 112; 30 Digest 521, 1758	542, 549
Doe d. Chandler v. Ford (1835), 3 Ad. & El. 649; 21 Digest 264, 847	755
Donovan v. Union Cartage Co., Ltd., [1933] 2 K.B. 71; Digest Supp.	698, 699
Duc d'Aumale (No. 2), The, [1904] P. 60; 41 Digest 837, 6990	41, 43, 44, 45, 46, 43
Dunlop Rubber Co., Ltd. v. Dunlop, [1921] 1 A.C. 367; Digest, Practice, 536, 1992	725, 726, 729
Earl of Eglinton, The, (1855), Sw. 7; 41 Digest 871, 7460	50, 51
Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade Marks, [1898] A.C. 571; 15 R.P.C. 476; 43 Digest 140, 32	145, 149, 154
Edge v. Boileau (1885), 16 Q.B.D. 117; 31 Digest 125, 2590	590, 591
Edmonds v. Blaina Furnaces Co., Beesley v. Blaina Furnaces Co. (1887), 36 Ch. D. 215; 7 Digest 31, 155	232, 233
Elliott v. Burn, [1935] A.C. 84; 18 Tax Cas. 595; Digest Supp.	86, 87, 88, 89, 90, 91, 92, 95, 96, 98, 100, 101, 102, 103, 105, 106, 107
Ellis v. Walker (1756), Amb. 310	602, 604
Emmerson v. Heelis (1809), 2 Taunt. 38; 39 Digest 260, 435	27, 32, 34, 35
Employers' Liability Assurance Corp. v. Sedgwick Collins & Co., [1927] A.C. 95; Digest Supp.	216, 217, 219
Evans v. Rival Granite Quarries, Ltd., [1910] 2 K.B. 979; 10 Digest 752, 4698	232, 233, 241
Evans & Bettell's Contract, Re, [1910] 2 Ch. 438; 23 Digest 431, 5022	607, 614
Ewell Grove, The, (1835), 3 Hag. Adm. 209; 41 Digest 875, 7519	49, 51, 53, 54, 70
Exall v. Partridge (1799), 8 Term Rep. 308; 26 Digest 131, 947	2, 4
Excelsior, The, (1868), L.R. 2 A. & E. 268; 41 Digest 705, 5404	191, 192
Fanfold, Ltd.'s, Application, Re, (1928), 45 R.P.C. 325; 43 Digest 183, 338	145, 148, 154
Fardon v. Harcourt-Rivington (1932), 146 L.T. 391; Digest Supp.	617, 618, 620
Farmer v. Cotton's Trustees, [1915] A.C. 922	27, 37
Farnham v. Farnham (orse. Daniels), [1936] 3 All E.R. 776; Digest Supp.	131, 374, 375
Farquhar v. Newbury Rural Council, [1909] 1 Ch. 12; 26 Digest 289, 224	507, 508
Farrer v. Lowe (1889), 53 J.P. 183; 13 Digest 484, 343	301, 304, 305
Feist v. Société Intercommunale Belge d'Electricité, [1934] A.C. 161; Digest Supp.	206, 208, 210
Fell v. Fell (1922), 31 C.L.R. 268; 44 Digest 610, case e	355, 356, 357
Fenton, Re, Ez p. Fenton Textile Asscn., Ltd., [1931] 1 Ch. 85; Digest Supp.	2, 3
Feret v. Hill (1854), 15 C.B. 207; 12 Digest 290, 2387	637, 638
Fernando v. Fernando (1934), 36 N.L.R. 77	197
Fester, Fothergill & Hartung v. Russian Transport & Insurance Co., [1927] W.N. 27; Digest Supp.	216, 217
Finch v. Lane (1870), L.R. 10 Eq. 501; 44 Digest 1051, 9037	286, 292
Fingland & Mitchell v. Howie, [1926] S.C. 319; Digest Supp.	590, 591
Fisher v. Drewett (1878), 48 L.J.Q.B. 32; 1 Digest 510, 1759	757, 761
Fleetwood, Re, Sidgreaves v. Brewer (1880), 15 Ch. D. 594; 43 Digest 598, 463	453, 459
Floyer v. Banks (1863), 3 De G.J. & Sm. 306; 21 Digest 102, 754	286, 289, 292
Foakes v. Beer (1884), 9 App. Cas. 605; 12 Digest 457, 3701	443
Ford v. Blurton, Ford v. Sauber (1922), 38 T.L.R. 801	625, 627, 628
Fortescue v. St. Matthew, Bethnal Green, Vestry, [1891] 2 Q.B. 170; 26 Digest 513, 2173	523, 524, 525, 526
Foster v. Lyons & Co., [1927] 1 Ch. 219; Digest Supp.	258, 259, 261, 262
Foster v. Usherwood (1877), 3 Ex. D. 1; 16 Digest 118, 167	50, 53
Fraser v. Swansea Canal Co. (1834), 1 Ad. & El. 354; 38 Digest 126, 927	339, 340, 341
Freeman v. Cooke (1848), 2 Exch. 654; 21 Digest 287, 1019	749
French (L.) & Co. v. Leeston Shipping Co., [1922] 1 A.C. 451; 41 Digest 351, 2006	759, 763
Frost v. Knight (1872), L.R. 7 Exch. 111; 12 Digest 340, 2841	23, 24
Fry v. Salisbury House Estate, Ltd.; Jones v. City of London Real Property Co., Ltd., [1930] A.C. 432; 15 Tax Cas. 266; Digest Supp.	86, 95, 99
Gardner, Re, Huey v. Cunningham, [1920] 2 Ch. 523; 43 Digest 598, 465	453, 454, 455
Garrett's Application, Re, [1916] 1 Ch. 436; 33 R.P.C. 117; 43 Digest 183, 336	146, 148

	PAGES
Geiger, <i>Re</i> , [1915] 1 K.B. 439; 4 Digest 242, 2238	323, 325, 328
Gisborne Borough v. Auckland Provincial Patriotic & War Relief Assocn., [1916] N.Z.L.R. 218	646, 647
Glasgow Corp'n. v. Taylor, [1922] 1 A.C. 44; 36 Digest 70, 453	698
Glenfruin, <i>The</i> , (1885), 10 P.D. 103; 41 Digest 843, 7056	41, 42, 43
Glengaber, <i>The</i> , (1872), L.R. 3 A. & E. 534; 1 Asp. M.L.C. 401; 41 Digest 843, 7059	41, 42, 43, 44, 45, 47
Glossop v. Heston & Isleworth Local Board (1879), 12 Ch. D. 102; 44 Digest 51, 365	765, 767, 770
Goding v. Ferris (1791), 2 Hy. Bl. 14	339, 341
Goldsmith v. Deakin (1933), 50 T.L.R. 73; Digest Supp.	349, 352
Goodyear v. Weymouth & Melcombe Regis Corp'n. (1865), 35 L.J.C.P. 12; 7 Digest 381, 199	703, 705
Gordon v. Metropolitan Police Chief Comr., [1910] 2 K.B. 1080; 1 Digest 42, 335	197, 637, 638, 643
Governments Stock & Other Securities Investment Co. v. Manila Ry. Co., [1897] A.C. 81; 10 Digest 761, 4758	232, 233
Graigola Merthyr Co., Ltd. v. Swansea Corp'n., [1928] Ch. 31; Digest Supp.	50, 53
Graves v. Legg (1854), 9 Exch. 709; 12 Digest 416, 3351	590, 591
Greenwood v. Martins Bank Ltd., [1933] A.C. 51; Digest Supp.	749
Gregory v. Torquay Corp'n., [1911] 2 K.B. 556; 32 Digest 540, 1927	50, 67
Griffiths v. Dudley (Earl) (1882), 9 Q.B.D. 357; 42 Digest 762, 1875	50, 51, 52, 60, 68
Hagen, <i>The</i> , [1908] P. 189; Digest, Practice, 340, 579	23, 24, 726, 730
Halifax Corp'n. v. Fairbanks' Estate, [1928] A.C. 117; Digest Supp.	250, 253
Hall v. Brooklands Auto-Racing Club, [1933] 1 K.B. 205; Digest Supp.	617, 618, 620
Hall & Barker, <i>Re</i> , (1878), 9 Ch. D. 538; 42 Digest 51, 414	562, 563, 564
Hamilton v. Gould (1839), 1 I.L.R. 171; 6 Digest 40, case c.	2, 10
Hamilton v. Long, [1903] 2 I.R. 407; affd. [1905] 2 I.R. 552; 34 Digest 173, 1365	581, 583
Hamlyn & Co. v. Talisker Distillery, [1894] A.C. 202; 11 Digest 389, 643	207, 208
Hannibal, <i>The</i> , <i>The Queen</i> (1867), L.R. 2 A. & E. 53; 41 Digest 712, 5488	40, 44
Harbin v. Masterman (1871), L.R. 12 Eq. 559; Digest Supp.	742, 743
Harbin v. Masterman, [1896] 1 Ch. 351; 23 Digest 400, 4714	742, 743, 746
Hardie & Lane, Ltd. v. Chiltern, [1928] 1 K.B. 663; Digest Supp.	75, 76
Harrington v. Price (1832), 3 B. & Ad. 170; 38 Digest 709, 535	530, 531
Harrison, <i>Re</i> , Turner v. Hellard (1885), 30 Ch. D. 390; 44 Digest 550, 3684	355, 356
Harter v. Salford Overseers (1865), 6 B. & S. 591; 38 Digest 525, 726	11, 12, 15, 17, 20, 21
Hartland v. Digginnes, [1926] A.C. 289; 28 Digest 88, 506	542, 544
Haskell v. Marlow, [1928] 2 K.B. 45; Digest Supp. 590, 591, 593, 594, 595, 596, 599	600, 601
Hastie v. Edinburgh Magistrates, [1907] S.C. 1102; 36 Digest 70, 450v	698, 699
Hatton, <i>Re</i> , (1872), 7 Ch. App. 723; 5 Digest 1115, 9088	671, 673
Hawken v. Bourne (1841), 8 M. & W. 703; 10 Digest 1100, 7711	75, 76
Hawkesley's Settlements, <i>Re</i> , Black v. Tidy, [1934] Ch. 384; Digest Supp.	453, 454
Haynes v. King, [1893] 3 Ch. 439; 19 Digest 132, 898	258, 259, 261, 262
Hazeldine's Trusts, <i>Re</i> , [1908] 1 Ch. 34; 32 Digest 484, 1468	530, 531
Heath, <i>Re</i> , Public Trustee v. Heath, [1936] Ch. 259; Digest Supp.	286, 292
Heaven v. Pender (1883), 11 Q.B.D. 503; 36 Digest 8, 9	339, 342
Hervey v. Wynn (1905), 22 T.L.R. 93; 32 Digest 413, 911	580, 531
Hesketh v. Birmingham Corp'n., [1924] 1 K.B. 260; 33 Digest 48, 280	760, 767
Hetley, <i>Re</i> , Hetley v. Hetley, [1902] 2 Ch. 866; 43 Digest 592, 415	453, 454, 459
Ricklin, <i>Re</i> , Public Trustee v. Hoare, [1917] 2 Ch. 278; 43 Digest 1035, 4762	518, 520
Higgins v. Harrison (1932), 25 B.W.C.C. 113; Digest Supp.	171, 176, 177
Hill v. Gregory, [1912] 2 K.B. 61; 28 Digest 8, 28	86, 87
Hindle v. Birtwistle, [1897] 1 Q.B. 192; 24 Digest 909, 71	171, 174
Hjortholm, <i>The</i> , (1935), 63 L.L.R. 278	191, 192
Hoddesdon U.D.C. v. Broxbourne Sand and Ballast Pits, Ltd., [1936] 1 All E.R. 798; Digest Supp.	507
Holland v. Bennett, [1902] 1 K.B. 867; 34 Digest 100, 741	23, 24
Holliday v. Lockwood, [1917] 2 Ch. 47; 40 Digest 257, 2233	27, 29, 34
Holliday v. National Telephone Co., [1899] 2 Q.B. 392; 34 Digest 163, 1271	108, 111
Hollins v. Fowler (1875), L.R. 7 H.L. 757; 43 Digest 471, 102	339, 341
Holman v. Johnson (1775), 1 Cowp. 341; 12 Digest 279, 2288	637, 644
Holt v. Catterall (1931), 47 T.L.R. 332; Digest Supp.	566
Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd., [1934] 1 K.B. 191; Digest Supp.	109, 112
Hope v. Leng (W.C.) & Co. (Sheffield Telegraph), Ltd. (1907), 23 T.L.R. 243; 32 Digest 140, 1711	773, 774, 777
Horlick v. Scully, [1927] 2 Ch. 150; Digest Supp.	590, 591
Houghton & Co. v. Nothard, Lowe & Wills, [1927] 1 K.B. 246; Digest Supp.	232, 233, 238, 239
Houstman v. Thornton (1816), Holt, N.P. 242; 29 Digest 204, 1636	158, 159
Howard Houlder & Partners, Ltd. v. Manx Isles S.S. Co., [1923] 1 K.B. 110; 41 Digest 350, 2001	757, 763
Howarth, <i>Re</i> , Howarth v. Mabinson, [1909] 2 Ch. 19; 43 Digest 676, 1071	742, 744
Howe (Earl) v. Inland Revenue Commissioners, [1918] 2 K.B. 584; on app. [1919] 2 K.B. 336; 42 Digest 671, 816	607, 610
Hudson v. Tabor (1877), 2 Q.B.D. 290; 44 Digest 82, 640	765, 766, 769
Hughes v. Chatham Overseers, Burton's Case (1843), 5 Man. & G. 54, 77; 30 Digest 521, 1757	542, 549, 550, 552
Hughes v. Jones (1861), 3 De G. F. & J. 307; 40 Digest 127, 1009	783, 786
Hulton, <i>Re</i> , Midland Bank Executor & Trustee Co., Ltd. v. Thompson, [1936] Ch. 536; [1936] 2 All E.R. 207; Digest Supp.	518, 519, 520, 521
Hussey v. Horne-Payne (1879), 4 App. Cas. 311; 12 Digest 72, 420	703
Huxtable, <i>Re</i> , Huxtable v. Crawford, [1902] 2 Ch. 793; 8 Digest 304, 332	453, 459
Hyams v. Stuart King, [1908] 2 K.B. 696; 25 Digest 401, 58	442, 444, 447, 448
Ideal Films, Ltd. v. Richards, [1927] 1 K.B. 374; Digest, Practice, 267, 45	75, 76, 79
Illingworth v. Houldsworth, [1904] A.C. 355; 10 Digest 750, 4690	232, 233

	PAGES
Impex Electrical, Ltd. v. Weinbaum, <i>Re</i> Impex Electrical, Ltd.'s, Trade Marks (1927), 44 R.P.C. 405; 43 Digest 220, 655	145, 147
Inchballd v. Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd. (1864), 17 C.B.N.S. 733; 1 Digest 542, 1952	757, 761
Inland Revenue Comrs. v. Miller, [1930] A.C. 222; 15 Tax Cas. 25; Digest Supp. 541, 542, 548, 551, 553, 555	541, 542, 548, 551, 553, 555
International Trustee for the Protection of Bondholders Aktiengesellschaft v. R., [1936] 3 All E.R. 407; Digest Supp.	206, 208, 210
Inverclyde (otherwise Tripp) v. Inverclyde, [1931] P. 29; Digest Supp.	708, 710, 711
Iodine, The, (1844), 3 Notes of Cases, 140; 39 Digest 319, 32	49, 51, 53, 56, 57, 71, 72, 74
Isaacs & Sons v. Salbstein, [1916] 2 K.B. 139; 30 Digest 136, 141	358
Itala Fabbrica di Automobili's Application, <i>Re</i> , (1910), 27 R.P.C. 493; 43 Digest 186, 349	145, 147, 149
Jackson v. Simons, [1923] 1 Ch. 373; 81 Digest 378, 5241	513, 516
Jacobs, <i>Re</i> , <i>Ex p.</i> Jacobs (1875), 10 Ch. App. 211; 5 Digest 1070, 8761	671, 673
James Tucker S.S. Co. v. Lamport & Holt (1906), 23 T.L.R. 10; Digest, Practice, 483, 1625	115, 128
Jaques v. South Essex Waterworks Co. (1904), 20 T.L.R. 563; 30 Digest 246, 456	737, 739
Janera, The, [1928] P. 55; Digest Supp.	216, 218, 220
Jenkins v. Bushby, [1891] 1 Ch. 484; Digest, Practice, 536, 1990	625, 626, 629
Jenkins & Co. v. Simon, [1926] 1 K.B. 111; Digest Supp.	737
Jenkinson, <i>Re</i> , (1857), 24 Beav. 64; 21 Digest 88, 643	286, 289
Jenks v. Turpin (1884), 13 Q.B.D. 505; 25 Digest 423, 260	179, 180
John Lane The Bodley Head, Ltd. v. Associated Newspapers, Ltd., [1936] 1 K.B. 715; [1936] 1 All E.R. 379; Digest Supp.	339, 342
Johnson v. Ball (1851), 5 De G. & Sm. 85; 43 Digest 598, 464	453, 454, 455, 459, 460
Johnson v. Taylor Brothers & Co., Ltd., [1920] A.C. 144; 39 Digest 660, 2515	725, 728, 731
Johnston & Toronto Type Foundry Co. v. Toronto Consumers' Gas Co., [1898] A.C. 447; 10 Digest 1171, 8316	766
Jones v. London County Council (1932), 96 J.P. 371; Digest Supp.	617, 618
Jones v. Pritchard, [1908] 1 Ch. 630; 36 Digest 195, 363	137, 138
Jones v. S.R. Anthracite Collieries, Ltd. (1920), 90 L.J.K.B. 1315; Digest, Practice, 558, 2171	358, 359, 364, 365, 366
Keasley v. Thomson (1890), 24 Q.B.D. 742; 12 Digest 285, 2333	637, 638, 642
Keeling v. Cook (1934), 78 L.Jo. 306; Digest Supp.	625, 626, 627, 630
Kewney v. Attrill (1886), 34 Ch. D. 345; 36 Digest 489, 1540	276, 277, 278, 279, 280, 284
Kibble v. Fairthorne, [1895] 1 Ch. 219; 32 Digest 471, 1353	580, 581
Kimber v. Press Assocn., [1893] 1 Q.B. 65; 32 Digest 136, 1666	773, 774
Kimbers & Co. v. Inland Revenue Comrs. (1935), 51 T.L.R. 421; Digest Supp.	27, 29
King Line, Ltd. v. Westralian Farmers, Ltd. (1932), 48 T.L.R. 598; Digest Supp.	646, 655
Kinnell Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell), [1931] A.C. 575; Digest Supp.	659, 667, 668
Kinnell v. Walker (1911), 27 T.L.R. 257; Digest, Practice, 892, 4340	116
Kirby v. Hunslet Assessment Committee, [1906] A.C. 43; 38 Digest 533, 785	11, 12, 16, 20, 21, 22
Klamborowski v. Cooke (1897), 14 T.L.R. 88; Digest, Practice, 498, 1731	737, 739
Kodak, Ltd. v. Alpha Film Corpn., Ltd., Huth (Frederick) & Co. v. Jackson, [1930] 2 K.B. 340; Digest, Practice, 298, 290	625, 627
Koursk, The, [1924] P. 140; 41 Digest 798, 6591	191, 192, 339, 342
Lafferty v. Barrhead Co-operative Society (1919), 1 S.L.T. 257; Digest Supp.	631, 636
Laird v. Briggs (1881), 16 Ch. D. 663; Digest, Practice, 805, 3678	358, 359
Lalandid, The, [1933] P. 56; Digest Supp.	216, 217
Lampligh v. Braithwaite (1615), Hol. 105; 12 Digest 522, 4341	2, 8
Lancashire Loans, Ltd. v. Black, [1934] 1 K.B. 380; Digest Supp.	381, 382
Landshowne v. Landshowne (1820), 2 Bl. 60; 17 Digest 315, 1265 xv.	646, 647
Latham v. Johnson (R.) & Nephew, Ltd., [1913] 1 K.B. 398; 36 Digest 38, 223	333, 337, 698, 699
Lazard Bros. & Co. v. Midland Bank, Ltd., [1933] A.C. 289; Digest Supp.	23, 24
Lea (R. J.), Ltd.'s, Application, <i>Re</i> , [1913] 1 Ch. 446; 30 R.P.C. 216; 43 Digest 150, 99	146, 149
Levy v. Abercorris Slate & Slab Co. (1887), 37 Ch. D. 260; 7 Digest 31, 156	232, 233
Liddle v. North Riding of Yorkshire County Council, [1934] 2 K.B. 101; Digest Supp.	333, 337
Linotype Co.'s Trade Mark, <i>Re</i> , [1900] 2 Ch. 238; 17 R.P.C. 380; 43 Digest 138, 16	146, 147, 148
Liverpool Corpn. v. Chorley Union Assessment Committee, [1913] A.C. 197; 38 Digest 428, 36	11, 12, 19
Liverpool Electric Cable Co.'s Application, <i>Re</i> , (1928), 46 R.P.C. 99; Digest Supp.	146, 148, 149
Lloyds Bank, Ltd. v. Savory (E. B.) & Co., [1933] A.C. 201; Digest Supp.	183, 184, 186
Logan v. Bank of Scotland (No. 2), [1906] 1 K.B. 141; 11 Digest 477, 1310	23, 24, 26
London & Northern Bank, <i>Re</i> , Mack's Claim, [1900] W.N. 114; 9 Digest 526, 3467	566
London Assocn. for Protection of Trade v. Greenlands, Ltd., [1916] 2 A.C. 15; Digest, Practice, 420, 1166	75, 77, 79, 80
London Celluloid Co., <i>Re</i> (1888), 39 Ch. D. 190; 9 Digest 298, 1848	749, 750
London Chartered Bank of Australia, <i>Re</i> , [1893] 3 Ch. 540; 10 Digest 1055, 7379	671, 673
Lord Advocate v. Macalister, [1924] A.C. 586; 21 Digest 107, 796	286, 289, 290, 291
Lott v. Outhwaite (1893), 10 T.L.R. 76; 1 Digest 514, 1775	757, 762
Louisa, The, (1813), 1 Dods. 317; 39 Digest 319, 38	50, 51, 53, 72
Lustre, The, (1834), 3 Hag. Adm. 154; Digest Supp.	49, 51, 52, 53, 54, 73
Lyme Regis Corpn. v. Henley (1831), 1 Bing N.C. 222; 44 Digest 83, 642	766
Lynam v. Gowing (1880), 6 L.R. Ir. 259	773, 774, 777
Lyttleton Times Co., Ltd. v. Warners, Ltd., [1907] A.C. 476; 12 Digest 608, 5033	137, 178, 140
Mabro v. Eagle, Star, & British Dominions Insurance Co., Ltd., [1932] 1 K.B. 485; Digest, Practice, 405, 1067	75, 77
MacLaine v. Gatty, [1921] 1 A.C. 376; 35 Digest 298, 490	749
McCombie v. Davies (1805), 6 East, 538; 43 Digest 494, 332	339, 341
McCormick v. Grogan (1869), L.R. 4 H.L. 82; 43 Digest 600, 480	453, 457, 458, 459

	PAGES
M'Dougall v. Sutherland (1894), 3 Tax Cas. 261; 28 Digest 90, case 536 i	542, 550, 551, 553
M'Innes v. Inland Revenue, [1934] S.C. 424; Digest Supp.	27, 29
M'LAY (M'Queen's Trustee) v. M'Queen (1899), 36 Sc. L.R. 568	703
Maddison v. Alderson (1883), 8 App. Cas. 467; 44 Digest 179, 80	50, 53, 67
Magnolia Metal Co.'s Trade Marks, <i>Re</i> , [1897] 2 Ch. 371; 14 R.P.C. 621; 43 Digest 213, 583	145, 147, 149, 156
Mahony v. East Holyford Mining Co. (1875), L.R. 7 H.L. 869; 9 Digest 642, 4239	232, 237
Manchester Bonded Warehouse Co. v. Carr (1880), 5 C.P.D. 507; 31 Digest 258, 3990	590, 591, 594
Mann v. Copland (1817), 2 Madd. 223; 39 Digest 182, 708	602, 604
Manners v. Mew (1885), 29 Ch. D. 725; 35 Digest 477, 2111	530, 531
Manton v. Tabois (1885), 30 Ch. D. 92; 44 Digest 710, 5545	227, 228
Marshall, <i>Re</i> , Marshall v. Marshall, [1914] 1 Ch. 192; 43 Digest 868, 3128	368, 369, 370, 372
Martin v. Benson, [1927] 1 K.B. 771; Digest Supp.	116
Martin v. Stout, [1925] A.C. 359; Digest Supp.	23, 24
Mary Ann, The, (1823), 1 Hag. Adm. 158; 41 Digest 865, 7355	49, 51, 53, 72
Mason & Wood, Ltd. v. Greene, [1936] 2 K.B. 370; [1936] 2 All E.R. 509; Digest Supp.	381, 382
Master v. Miller (1793), 2 Hy. Bl. 141; 6 Digest 372, 2450	197
Matti, The, [1918] P. 314; 41 Digest 166, 72	50, 51, 52, 53, 57, 74
Maxwell v. Keun, [1928] 1 K.B. 645; Digest, Practice, 558, 2169	358, 359
Megrath v. Gray, Gray v. Megrath (1874), L.R. 9 C.P. 216; 5 Digest 1057, 8640	672, 673
Melanie (Owners) v. San Onofre (Owners), [1925] A.C. 246; 41 Digest 850, 7132	40, 44, 48
Mercantile Marine Service Assocn. v. Toms, [1916] 2 K.B. 243; 43 Digest 126, 1288	75, 77
Mersey Docks Trustees v. Gibbs (1866), L.R. 1 H.L. 93; 38 Digest 35, 209	766, 767
Michell v. Brown (1858), 1 E. & B. 267; 42 Digest 767, 1935	524, 526
Midland Ry. Co. v. Withington Local Board (1883), 11 Q.B.D. 788; 38 Digest 123, 905	50, 53, 59
Miller v. Dell, [1891] 1 Q.B. 468; 43 Digest 487, 236	339, 343
Mills v. London County Council, [1925] 1 K.B. 213; 42 Digest 922, 171	265, 269
Mitchell, <i>Re</i> , Freelove v. Mitchell, [1913] 1 Ch. 201; 26 Digest 128, 915	2, 3, 6
Mitchell v. Cantrill (1887), 37 Ch. D. 56; 19 Digest 128, 853	258, 259, 261, 262
Mitchell v. Jones (1905), 24 N.Z.L.R. 932; 39 Digest 535, case a	420, 423
Mitchell v. Weise, <i>Ex p.</i> Friedheim, [1892] W.N. 139; 36 Digest 489, 1545	276, 278, 284
Mohun v. Mohun (1818), 1 Swan. 201; 44 Digest 611, 4378	355, 356
Montefiori v. Montefiori (1762), 1 Wm. Bl. 363; 12 Digest 251, 2053	41, 46
Moore v. Morris (1871), L.R. 13 Eq. 139; 23 Digest 209, 2485	474, 478
Morgan v. Fear, [1907] A.C. 425; 19 Digest 129, 860	257, 261
Morgana, The, [1920] P. 442; Digest Supp.	50, 51, 53
Morison v. London, County & Westminster Bank, Ltd., [1914] 3 K.B. 356; 34 Digest 132, 1011	339, 341
Morrice v. Redwyn (1731), 2 Barn. K.B. 26; 26 Digest 130, 937	2, 5
Morris v. Baron & Co., [1918] A.C. 1; 39 Digest 398, 341	50, 53, 67
Morris v. Delobbel-Flipo, [1892] 2 Ch. 352; 7 Digest 19, 82	232, 233
Mowbray, Robinson & Co. v. Rosser (1922), 91 L.J.K.B. 524; 41 Digest 614, 4440	646, 647
Munro v. Stamp Duties Comr., [1934] A.C. 61; Digest Supp.	250
Murray v. Milner (1879), 12 Ch. D. 845; 3 Digest 367, 84	131, 133
Mutzenbecher v. La Aseguradora Espanola, [1906] 1 K.B. 254; 12 Digest 317, 2624	23, 24, 26
National Galvanizers, Ltd.'s, Application, <i>Re</i> , (1920), 37 R.P.C. 202; 43 Digest 154, 126	146, 148
National Provincial Bank of England, Ltd. v. United Electric Theatres, Ltd., [1916] 1 Ch. 132; 10 Digest 751, 4697	232, 233
Neil, <i>Re</i> , Hemming v. Neil (1890), 62 L.T. 649; 43 Digest 854, 3021	245, 248
Neptune, The, (1824), 1 Hag. Adm. 227; 41 Digest 256, 633	49, 55
Nevill v. Fine Art & General Insurance Co., [1897] A.C. 68; 32 Digest 154, 1868	115, 116, 120
New Sharlston Collieries Co., Ltd. v. Westmorland (Earl) (1900), [1904] 2 Ch. 443, n.; 34 Digest 713, 982	86
Newcastle (Duke) v. Clark (1818), 3 Taunt. 602; 41 Digest 55, 407	765, 767, 770
Newton Abbot Rural District Council v. Wills (1913), 77 J.P. 333; 26 Digest 392, 1186	507, 508
Nichols v. Marsland (1876), 2 Ex. D. 1; 36 Digest 197, 376	766
Nicoll v. Austin (1935), 19 Tax Cas. 531	542
Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katherine's Docks Co. (1878), 9 Ch. D. 503; 44 Digest 63, 449	766
North of England Iron Steamship Insurance Assocn. v. Armstrong (1870), L.R. 5 Q.B. 244; 29 Digest 122, 748	714, 715, 720, 722, 723
Notox, Ltd., <i>Re</i> , Application by, for a Trade Mark, <i>Re</i> Inecto Incorporated (1930), 48 R.P.C. 168; Digest Supp.	146, 149
Nunan v. Southern Ry. Co., [1923] 2 K.B. 703; [1924] 1 K.B. 223; Digest Supp.	109, 114
Oakley v. Lyster, [1931] 1 K.B. 148; Digest Supp.	339, 341
O'Grady v. Bullcroft Main Collieries, Ltd., O'Grady v. Markham Main Colliery, Ltd. (1932), 17 Tax Cas. 93; Digest Supp.	86, 87
Oliver v. United Collieries, Ltd., [1935] S.C. 845	677, 688, 689, 690, 693
Onley v. Gee (1861), 25 J.P. 342; 25 Digest 450, 416	309, 312
Orpen v. Haymarket Capitol, Ltd. (1931), 145 L.T. 614; Digest Supp.	733, 734
O'Shea, <i>Re</i> , <i>Ex p.</i> Lancaster, [1911] 2 K.B. 981; 25 Digest 415, 192	178, 180, 181
Ottoman Bank of Nicosia v. Dascalopoulos, [1934] A.C. 354; Digest Supp.	646, 647
Owens v. Woosman, Owens v. Jones (1868), L.R. 3 Q.B. 469; 13 Digest 489, 394	301, 305
Paget v. Huish (1863), 1 Hem. & M. 663; 39 Digest 177, 662	602, 603
Paine & Co. v. Daniells & Sons' Breweries, <i>Re</i> Paine & Co.'s Trade Marks, [1893] 2 Ch. 567; 10 R.P.C. 217; 43 Digest 194, 422	146, 147, 149
Palaniappa v. Saminathan (1913), 17 N.L.R. 56	197
Paley (Princess Olga) v. Weisz, [1929] 1 K.B. 718; Digest Supp.	207, 209, 212
Palmer v. Johnson (1884), 13 Q.B.D. 351; 40 Digest 105, 329	783, 786
Park Gate Iron Co., Ltd. v. Coates (1870), L.R. 5 C.P. 634; 42 Digest 761, 1872	50, 59, 60
Parkfield Trust, Ltd. v. Curtis, [1934] 1 K.B. 685; Digest Supp.	381, 382
Parlement Belge, The, (1880), 5 P.D. 197; 41 Digest 815, 6758	41, 43

	PAGES
Parry, <i>Re</i> , Scott v. Leak (1889), 42 Ch. D. 570; 23 Digest 400, 4713	607, 614
Payne v. Deputy Federal Commr. of Taxation, [1936] A.C. 497; [1936] 2 All E.R. 793; Digest Supp.	646, 647, 657
Pearce v. Brooks (1866), L.R. 1 Exch. 213; 12 Digest 264, 2156	637, 641
Pearson & Son, Ltd. v. Dublin Corp., [1907] A.C. 351; 1 Digest 588, 2250	50, 52, 53
Peebles v. Crosthwaite (1897), 13 T.L.R. 198; 31 Digest 376, 5226	513, 516
Penny v. Wimbledon Urban Council, [1899] 2 Q.B. 72; 34 Digest 161, 1260	108, 111, 112
Pentrikbyer Navigation Colliery Co. v. Edwards, [1933] A.C. 28; Digest Supp.	677, 680
Perry v. London General Omnibus Co., [1916] 2 K.B. 335; 13 Digest 485, 351	301, 307
Peters v. Jones, [1914] 2 K.B. 781; 34 Digest 174, 1377	581, 583
Philippart v. Whiteley (William), Ltd., <i>Re</i> Philippart's Trade Mark "Diabolo," [1908] 2 Ch. 274; 25 R.P.C. 565; 43 Digest 141, 36	145, 147, 148, 155
Phillips v. Eyre (1870), L.R. 6 Q.B. 1; 11 Digest 410, 783	216, 217
Phoenix Assurance Co. v. Spooner, [1905] 2 K.B. 753; 29 Digest 306, 2535	714, 724
Pinnel's Case (1602), 5 Co. Rep. 117a; 12 Digest 455, 3678	443
Pirie (Alexander) & Sons, Ltd.'s Trade Mark, <i>Re</i> (1933), 50 R.P.C. 147; Digest Supp.	145, 157
Polurrian S.S. Co., Ltd. v. Young, [1915] 1 K.B. 922; 29 Digest 273, 2213	158, 159, 164, 165, 166
Powell v. Vickers, Sons & Maxm, Ltd., [1907] 1 K.B. 71; Digest, Practice, 490, 1668	116, 128, 129
	222, 225, 226
Price, <i>Re</i> , Price v. Newton, [1905] 2 Ch. 55; 44 Digest 729, 5831	227, 228, 229, 230
Protector Endowment Loan & Annuity Co. v. Grice (1880), 5 Q.B.D. 592; 7 Digest 220, 628	442, 443, 449
"Pup," In the Matter of a Trade Mark, (1933), 50 R.P.C. 198	146, 149
Purcell v. Sowler (1877), 2 C.P.D. 215; 32 Digest 146, 1764	404, 405
Purkiss v. Walthamstow Borough Council (1934), 151 L.T. 30; Digest Supp.	333, 336, 698, 699
Purlbach Colliery Co., Ltd. v. Woodman, [1915] A.C. 684; 19 Digest 13, 27	137, 138
R. v. Bertrand (1867), L.R. 1 P.C. 520; 14 Digest 309, 3261	50, 60
R. v. Blenkinsop, [1892] 1 Q.B. 43; 35 Digest 163, 586	748, 754
R. v. Catt (1795), 6 Term Rep. 332; 38 Digest 454, 207	542, 543
R. v. Essex Sewers Comrs. (1885), 14 Q.B.D. 561; affd. Fobbing Sewers Comrs. v. R. (1886), 11 App. Cas. 449; 41 Digest 53, 386	766, 772
R. v. Green (1829), 9 B. & C. 203; 38 Digest 452, 185	542, 543
R. v. McDonald (1885), 15 Q.B.D. 323; 3 Digest 54, 4	420, 424
R. v. Marshland, Smeth & Fen District Comrs., [1920] 1 K.B. 155; 38 Digest 37, 220	766
R. v. Minister of Transport, <i>Ex p.</i> Upminster Services, Ltd., [1934] 1 K.B. 277; Digest Supp.	265, 269
R. v. Munday (1801), 1 East, 584; 38 Digest 452, 184	542, 543
R. v. O.K. Social & Whist Club, Ltd. (1929), 45 T.L.R. 570; Digest Supp.	178, 180
R. v. Selby Dam Drainage Comrs., [1892] 1 Q.B. 348; 41 Digest 59, 430	766, 767
R. v. Stringer, [1933] 1 K.B. 704; Digest Supp.	319
R. v. Surrey Assessment Committee, North-Eastern Assessment Area, <i>Ex p.</i> Woolworth (F. W.) & Co., Ltd., [1933] 1 K.B. 776; Digest Supp.	403, 405, 409, 410
R. v. Yorkshire Traffic Comrs. (April, 1933), Unreported	265, 271
Raikes, The (1824), 1 Hag. Adm. 246; 41 Digest 866, 7376	50, 69
Railway Assessment Authority v. Southern Ry. Co., [1936] 1 All E.R. 26; Digest Supp.	431, 432
Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., [1921] 2 A.C. 465; 36 Digest 192, 332	513, 516
Ramen Chetty v. Renganathan (1927), 28 N.L.R. 339	197
Ramsay's Settlement, <i>Re</i> , (1861), 30 Beav. 75; 21 Digest 91, 670	286, 290
Rapid, The, (1838), 3 Hag. Adm. 419; 39 Digest 321, 65	50, 51
Rawlings v. Jennings (1806), 13 Ves. 39; 44 Digest 695, 5363	142, 143
Read v. Brown (1888), 22 Q.B.D. 128; 1 Digest 13, 107	339, 340
Readhead v. Midland Ry. Co. (1869), L.R. 4 Q.B. 379; 30 Digest 205, 748	617, 620
Reckitt v. Barnett, Pembroke & Slater, Ltd., [1929] A.C. 176; Digest Supp.	339, 341
Reney v. Kirkcudbright Magistrates, [1892] A.C. 264; 41 Digest 978, 8670	191, 192, 194
Reesby (Owners) v. Cobetas (Owners), (1923) S.L.T. 492	216, 218
Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry. (1900), 69 L.J. Ch. 813; 12 Digest 340, 2840	23, 24
Richardson, <i>Re</i> , <i>Ex p.</i> St. Thomas's Hospital (Governors), [1911] 2 K.B. 705; 5 Digest 673, 5958	2, 3, 5, 6
Ridd v. Thorne, [1902] 2 Ch. 344; 36 Digest 489, 1543	276, 278
Riddell, <i>Re</i> , Public Trustee v. Riddell, [1936] Ch. 747; [1936] 2 All E.R. 1600; Digest Supp.	518, 519, 520, 521
Riordan v. Banon (1876), 10 I.R. Eq. 469; 43 Digest 599, case q	453, 454, 459
Roberts v. Brennan, [1902] P. 143; 11 Digest 428, 926	708, 711, 712
Roberts v. Ogilby (1821), 9 Price 269; 1 Digest 287, 179	498, 502
Romer & Haslam, <i>Re</i> , [1893] 2 Q.B. 286; 42 Digest 51, 416	562, 563
Rosalie, The, (1853), 1 Ecc. & Ad. 188; 41 Digest 873, 7495	50, 51, 73
Rosler v. Hilbery, [1925] 1 Ch. 250; Digest, Practice, 340, 532	726
Rowbotham v. Wilson (1860), 8 H.L. Cas. 348; 19 Digest 9, 8	86, 98
Royal British Bank v. Turquand (1856), 6 E. & B. 327; 9 Digest 615, 4094	232, 233
Ruff (T. A.) & Co. v. Pauwels, [1919] 1 K.B. 660; 16 Digest 178, 8351	358, 359
Russell v. Russell, [1924] A.C. 687; Digest Supp.	130, 131, 132, 133, 134, 135, 374
Russell v. Town & County Bank (1888), 13 App. Cas. 418; 2 Tax Cas. 321; 28 Digest 45, 227	542, 547
Russell (Archibald), Ltd. v. McNeilly (1934), 27 B.W.C.C. 362; Digest Supp.	677, 679, 680, 681, 683, 684, 686, 688, 689
Ryalls v. Leader (1866), L.R. 1 Exch. 296; 32 Digest 137, 1671	773, 774
Rylands v. Fletcher (1868), L.R. 3 H.L. 330; 36 Digest 187, 311	765, 771
Sabatier v. Trading Co., [1927] 1 Ch. 495; Digest Supp.	216, 217
St. Nazaire Co., <i>Re</i> (1879), 12 Ch. D. 88; Digest, Practice, 815, 3759	736, 738
St. Pierre v. South American Stores (Gath & Chaves), Ltd., [1936] 1 K.B. 382; Digest Supp.	206

	PAGES
Salt (Sir Titus), Sons & Co.'s Application, <i>Re</i> , [1894] 3 Ch. 166; 11 R.P.C. 517; 43 Digest 146, 74	145, 147, 148, 155
Salvesen (or von Lörang) v. Austrian Property Administrator, [1927] A.C. 641; Digest Supp.	708, 711
Sandwell Park Colliery Co., Ltd., <i>Re</i> , [1914] 1 Ch. 589; 10 Digest 1054, 7369	672, 674
Sarat Chunder Dey v. Gopal Chunder Lala (1892), 56 J.P. 741; 35 Digest 35, 280	749
Sarpen, The, [1916] P. 306; 41 Digest 846, 7085	50, 51, 53, 56, 57, 71, 72
Saskatoon City v. London & Western Trusts Co., Ltd., [1934] 1 D.L.R. 103; Digest Supp.	646, 647, 655
Saunders v. Vautier (1841), Cr. & Ph. 240; 44 Digest 444, 2691	742, 743, 746
Scales v. Lawrence (1860), 2 F. & F. 289; 31 Digest 326, 4682	590, 591, 598
Scarf v. Jardine (1882), 7 App. Cas. 345; 4 Digest 450, 4069	659, 665
Schintz, <i>Re</i> , Schintz v. Warr, [1926] Ch. 710; Digest, Practice, 358, 716	23, 24
Scott v. Brown, Doering, McNab & Co., Slaughter & May v. Brown, Doering, McNab & Co., [1892] 2 Q.B. 724; 1 Digest 41, 326	197, 637, 641
Seaton v. Burnand, [1900] A.C. 135; 29 Digest 49, 117	115, 120
Sharpe v. Wakefield, [1891] A.C. 173; 42 Digest 621, 216	265, 269
Shaw (John) & Sons (Salford), Ltd. v. Shaw, [1935] 2 K.B. 113; Digest Supp.	698
Shelbury v. Scotsford (1602), Yelv. 23; 3 Digest 101, 286	498, 501
Shoolbred v. Roberts, [1900] 2 Q.B. 497; 25 Digest 407, 107	178, 180
Silver Bros., Ltd., <i>Re</i> , A.-G. for Quebec v. A.-G. for Canada, [1932] A.C. 514; Digest Supp.	250
Simpson, In the Estate of, In the Estate of Gunning, [1936] P. 40; Digest Supp.	474
Simpson v. Bloss (1816), 7 Taunt. 246; 12 Digest 279, 2283	637, 638, 641
Sitwell v. Londesborough (Earl), [1905] 1 Ch. 460; 19 Digest 25, 103	86, 91, 97
Slater v. Jones, Capes v. Ball (1873), L.R. 8 Exch. 186; 5 Digest 1176, 9514	671, 673, 674
Smith v. Seghill Overseers (1875), L.R. 10 Q.B. 422; 30 Digest 521, 1761	542, 550
Smith v. Smith, [1923] P. 191; 28 Digest 68, 361	465
Société Générale de Paris v. Dreyfus Bros (1885), 29 Ch. D. 239; (1887), 37 Ch. D. 215; Digest, Practice, 339, 574	726, 730
Sowter v. Steel Barrel Co., Ltd. (1935), 33 L.G.R. 376; Digest Supp.	376, 379
Spencer v. Kennedy, [1926] Ch. 125; Digest Supp.	566
Spirit of the Age, The, (1857), Sw. 286; 41 Digest 887, 7727	50, 53, 69
Stafford v. Kidd, [1936] 3 All E.R. 1023; Digest Supp.	131
Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd., [1934] 2 K.B. 305; Digest Supp.	420, 423
Staley v. Castleton Overseers (1864), 5 B. & S. 505; 38 Digest 525, 725	11, 12, 15, 17, 20, 21
Standard Woven Fabric Co.'s Application, <i>Re</i> , (1918), 35 R.P.C. 53; 43 Digest 139, 27	146, 147
Stapleford Colliery Co., <i>Re</i> , Barrow's Case (1880), 14 Ch. D. 432; 9 Digest 298, 1849	50, 65
Steamship Balmoral Co. v. Marten, [1902] A.C. 511; 29 Digest 232, 1876	714, 715, 717, 720
Steele v. Belfast Corp., [1920] 2 I.R. 125; 36 Digest 85, 665 <i>xxvii</i>	116
Stephens v. Badcock (1832), 3 B. & Ad. 354; 1 Digest 674, 2851	498, 505
Stepney Borough Council v. Walker (John) & Sons, Ltd., [1934] A.C. 365; Digest Supp.	432, 435
Stevens v. Walker, [1936] 2 K.B. 215; [1936] 1 All E.R. 892; Digest Supp.	301, 304, 306, 307, 308
Stewart v. Normanby Estate Co., Ltd. (1933), 18 Tax Cas. 244; Digest Supp.	86, 89
Stikstead, The, [1926] P. 205; 41 Digest 833, 6927	50, 52
Stringer v. English & Scottish Marine Insurance Co. (1870), L.R. 5 Q.B. 599; 29 Digest 255, 2067	158, 159, 164
Sturla v. Freccia (1880), 5 App. Cas. 623; 22 Digest 52, 288	131, 133
Suffield & Watts, <i>Re</i> , <i>Ex p.</i> Brown (1888), 20 Q.B.D. 693; Digest, Practice, 815, 3762	737, 738, 741
Sunlight, The [1904] P. 100; 41 Digest 971, 8624	191
Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd., [1936] Ch. 323; [1936] 1 All E.R. 177; Digest Supp.	339, 340, 341
Sutton v. Inland Revenue Comrs. (1929), 14 Tax. Cas. 662; Digest Supp.	542
Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants (1900), [1901] A.C. 426; 43 Digest 92, 957	75, 76
Tatam v. Reeve, [1893] 1 Q.B. 44; 25 Digest 411, 146	178, 180
Taylor v. Bowers (1876), 1 Q.B.D. 291; 12 Digest 283, 2319	637, 638, 642
Taylor v. Burger (1898), 78 L.T. 93; 41 Digest 971, 8620	191, 192, 194, 195
Taylor & Rumboll, <i>Re</i> , <i>Ex p.</i> Rumboll (1871), 6 Ch. App. 842; 5 Digest 1057, 8641	672, 673
Tenby Corp. v. Mason, [1908] 1 Ch. 457; 33 Digest 61, 370	404, 405
Tennant v. Smith, [1892] A.C. 150; 3 Tax. Cas. 158; 28 Digest 17, 87	542, 547, 549, 550, 551
Terrell v. Murray (1901), 17 T.L.R. 570; 31 Digest 331, 4749	590, 591, 594
Thames & Mersey Marine Insurance Co. v. British & Chilian S.S. Co., [1916] 1 K.B. 30, 21 Com. Cas. 150; 29 Digest 292, 2379	714, 715, 720, 722, 723
Thetis, The, (1833), 3 Hag. Adm. 14; 41 Digest 823, 6817	49, 51, 52, 53, 54, 69, 70, 73
Thomas v. Gower Rural Council, [1922] 2 K.B. 76; 41 Digest 47, 338	358, 359
Thompson v. London Midland & Scottish Ry. Co., [1930] 1 K.B. 41; Digest Supp.	109, 114
Thorne v. Tilbury (1858), 3 H. & N. 534; 3 Digest 102, 290	498, 501, 503
Timson v. Wilson, Fanshawe v. London & Provincial Dairy Co. (1888), 38 Ch. D. 72; Digest, Practice, 533, 1963	625, 626
Tollemache v. Inland Revenue Comrs. (1926), 11 Tax Cas. 277; Digest Supp.	542
Toomer, <i>Re</i> , <i>Ex p.</i> Blaiberg (1883), 23 Ch. D. 254; 7 Digest 108, 647	232, 233, 241
Toussaint v. Martinant (1787), 2 Term Rep. 100; 26 Digest 131, 948	2, 6
Trade Marks Registrar v. Du Cros (W. & G.), Ltd., [1913] A.C. 624; 30 R.P.C. 660; 43 Digest 155, 138	146, 148
Travis, <i>Re</i> , Frost v. Greatorex, [1900] 2 Ch. 541; 37 Digest 147, 725	743, 744
Tredwen v. Bourne (1840), 6 M. & W. 461; 10 Digest 1099, 7710	75, 76
Trollope (George) & Sons v. Caplan, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.	757, 763
Trollope (George) & Sons v. Martyn Bros., [1934] 2 K.B. 436; Digest Supp.	757, 760, 762, 763
Union Transport Finance, Ltd. v. Ballardie, [1937] 1 All E.R. 420; Digest Supp.	799
United Chemists' Trade Mark Assocn., Ltd., <i>Re</i> , (1923), 40 R.P.C. 219; 43 Digest 206, 526	140, 148

	PAGES
University College of North Wales v. Taylor, [1908] P. 140; 44 Digest 241, 675 ..	518, 519
Usill v. Hales (1878), 3 C.P.D. 319; 32 Digest 135, 1665	773, 774, 777, 778
Vancouver General Hospital v. McDaniel (1934), 152 L.T. 56; Digest Supp. ..	617, 618
Vanderpant v. Mayfair Hotel Co., Ltd., [1930] 1 Ch. 138; Digest Supp. ..	137, 138, 139
Vine, The, (1825), 2 Hag. Adm. 1; 41 Digest 841, 7035;	50, 69
Walker v. Bletchley Flettons, Ltd., [1937] 1 All E.R. 170; Digest Supp.	376
Walker v. Sur, [1914] 2 K.B. 930; Digest, Practice, 420, 1165	75, 76
Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society (1934), 50 C.L.R. 581	646, 647, 657
Warburton v. Huddersfield Industrial Society, [1892] 1 Q.B. 817; 28 Digest 119, 14 ..	631, 634, 635
Warschauer's Application, Re, (1925), 43 R.P.C. 46; 43 Digest 150, 97	146, 148, 149
Wason v. Walter (1868), L.R. 4 Q.B. 73; 32 Digest 144, 1754	773, 774
Waterloo, The, (1820), 2 Dods. 433;	49, 53, 55
Watkin v. Hall (1868), L.R. 3 Q.B. 396; 32 Digest 96, 1272	116
Watkins' Settlement, Re, Wills v. Spence, [1911] 1 Ch. 1; 39 Digest 146, 408	743, 744
Watson v. Threlkeld (1798), 2 Esp. 637; 27 Digest 212, 1837	581, 582
Watts v. Official Solicitor, [1936] 1 All E.R. 249; Digest Supp.	474, 479
Weatherall v. Thornburgh (1878), 2 Ch. D. 261; 37 Digest 146, 724	742, 743, 744
Webb v. Herne Bay Comrs. (1870), L.R. 5 Q.B. 642; 35 Digest 381, 1249	749, 750
Weber v. Birkett, [1925] 2 K.B. 152; 32 Digest 176, 2174	115, 116, 119, 127, 128, 129
Weiser v. Segar (No. 2) (1904), 48 Sol. Jo. 457; 35 Digest 67, 631	115, 116, 120
Wellcome (Trading as Burroughs, Wellcome & Co.) v. Thompson & Capper, Re Burroughs, Wellcome & Co.'s Trade Marks, [1904] 1 Ch. 736; 43 Digest 206, 525	146, 147
Wells v. Gas Float Whitton No. 2 (Owners), [1897] A.C. 337; 41 Digest 850, 7137	50, 51, 53
Welton v. Ruffles, [1920] 1 K.B. 226; 25 Digest 422, 253	309, 313
West of England Fire Insurance Co. v. Isaacs, [1897] 1 Q.B. 226; 29 Digest 306, 2534 ..	714, 724
West Ham Union v. Edmonton Union, [1908] A.C. 1; 37 Digest 237, 304	439, 440
Westmore v. Paine, [1891] 1 Q.B. 482; 33 Digest 411, 1212	50, 59
Wharton v. Masterman, [1895] A.C. 186; affg. Harbin v. Masterman, [1894] 2 Ch. 184; 44 Digest 444, 2689	742, 743, 744, 746
White v. Turnbull, Martin & Co. (1898), 78 L.T. 726; 41 Digest 351, 2005	757, 763
Wickremesuriya v. Silva (1935), 37 N.L.R. 274	197
Wilkinson v. Verity (1871), L.R. 6 C.P. 206; 32 Digest 327, 136	339, 341, 343
Williams v. Goose, [1897] 1 Q.B. 471; Digest, Practice, 498, 1730	737, 739
Williams v. Mersey Docks & Harbour Board, [1905] 1 K.B. 804; 36 Digest 131, 870 ..	50, 52
Wilson v. McIntosh (1894), 63 L.J.P.C. 49; 38 Digest 749, case f	50, 59
Wilsons, The, (1841), 1 Wm. Rob. 172; 39 Digest 321, 66	50, 51
Winn v. White (1772), 2 Wm. Bl. 839; 31 Digest 331, 4745	590, 591
Woffington v. Sparks (1754), 2 Ves. Sen. 569; Digest Supp.	2, 5
Wolverton v. A.-G., [1898] A.C. 535; 21 Digest 90, 660	286, 289
Wood v. McCarthy, [1893] 1 Q.B. 775; 43 Digest 126, 1236	75, 76
Woosung, The, (Cargo Ex) (1876), 1 P.D. 260; 41 Digest 856, 7222	50, 51
Wrightson v. McArthur & Hutchisons, [1921] 2 K.B. 807; Digest Supp.	232, 233, 241

CORRIGENDUM.

Page 82. *Re* FOREST OF DEAN (COAL MINES) SCHEME, 1930. Substitute in the headnote the following:
 HELD: the words in the proviso "fairly represent the trade of the mine" referred to the trade of the mine at the time of the determination of the annual basic tonnage and not to the trade in the years 1934 and 1935.

INDEX

	PAGE
Abandonment, true facts at time of, marine insurance, barratry ..	158
Accountant, solvency, finality of decision to ascertain ..	703
Action, Admiralty, <i>lis alibi pendens</i> whether bar to proceedings in England ..	216
Actual rate of interest, payment by instalments, moneylending transaction ..	380
Ademption, redeemed stock, redemption moneys placed on deposit ..	227
Admissibility, wife's evidence as to paternity of children born in wedlock, incapacity of husband ..	374
"Advances," subsidy received by sugar manufacturers from government, whether liable to income tax ..	413

AGENCY.

Commission—Agent prevented from earning—Wilful default of principal—Damages—Assessment [KAHN v. AIRCRAFT INDUSTRIES CORPORATION, LTD.] ..	757
Money recovered by agent on behalf of principal—Duty to account to principal—Jus tertii [BLAUSTEIN v. MALTZ, MITCHELL & CO.] ..	495
Agency in publication of slander, evidence ..	117

AGREEMENT FOR PAYMENT BY INSTALMENTS.

One instalment the delivery of specified articles—Balance of original sum to become due on default—Admissibility of evidence of value of specified articles—Penalty clause [LATTER v. COLWILL.] ..	442
Agreement, salvage, His Majesty's ships ..	49
Agricultural lorry, record of hours worked ..	495
Alteration of area, effect on settlement ..	439
Amendment, statutory period of limitation expired ..	732
Annual basic tonnage, coal mine scheme ..	82
Annuity, existing interests at disestablishment of Church in Wales, appointment to new office at special stipend ..	387
Articles of association giving directors power to borrow, delegation of borrowing power by company ..	231
Assessment committee meetings, right of county valuation officer to attend ..	403
—, of rates, basis of ..	11
Association, unincorporated, parties, representation order ..	75
Authority, ostensible, delegation of borrowing power by company, validity ..	231
Award, single verdict on several allegations of slander on separate occasions, validity ..	115
Balance sheet, release of director's loan, estoppel ..	693
Bank trustee, settled legacy, income fee, withdrawal fee ..	518

BANKERS.

Cheques—Fictitious payee—Forged indorsement—Statutory protection—Stamp Act, 1853 (c. 59), s. 19—Bills of Exchange Act, 1882 (c. 61), ss. 60, 79 (2), 82 [CARPENTERS CO. v. BRITISH MUTUAL BANKING CO., LTD.] ..	183
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BANKRUPTCY.

Committee of inspection—Members—Limited company—Proxy—Fiduciary position [Re BULMER, GREAVES v. INLAND REVENUE COMMISSIONERS] ..	323
Married woman—Debt not in respect of business—Guaranteed in 1933—Payment under guarantee in 1936—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 4 (1) (c) [Re A DEBTOR, No. 627 OF 1936] ..	1
Barratry, marine insurance, true facts at time of abandonment ..	158

BASTARDY

Presumption of legitimacy—Birth certificate—Rebutting evidence—Mother not father's wife—Evidence of father's will—Admissibility [Re HAMER'S ESTATE, PUBLIC TRUSTEE v. ATTORNEY-GENERAL] ..	130
Beneficiary absolutely entitled, right to call for trust estate, shares in private company ..	368
—, taking protected life interest, debt to estate, right to maintenance ..	244
—, under will, son as executor and beneficiary, son's debt guaranteed by testatrix, security taken after execution of will, release of debt ..	244
Beneficiary's name inserted in printed form of will, bequest left blank, testator's intention ..	355
Bequest left blank, beneficiary's name inserted, in printed form of will, testator's intention ..	355
Betting house, receiving money on deposit, information giving three dates, duplicity, "deposit" ..	309
Bigamy, nullity petition, jurisdiction founded on residence ..	708
Borrowing power of company, delegation, validity ..	231
Breach of contract, lessor's consent to assignment not obtained, return of deposit ..	513

BRIDGE.

Erected to avoid severance from highway—Covenant to maintain—Right to carry cables and mains over bridge [METROPOLITAN WATER BOARD v. WATKINS] ..	489
Buildings adjoining, leave to underpin wall, extension of works beyond wall, trespass ..	222
Charges, unregistered, floating charge, charge on fluctuating amount of produce in go-downs ..	231
Charging order, partnership action, priority ..	276
Cheques, fictitious payee and forged indorsement, statutory protection ..	183
Child of ratepayer, paddling pool, injury to foot ..	698
Children, by former or subsequent marriage, whether included in bequest ..	556
Club, playing card games for money, loans by supply of counters ..	178

	PAGE
Coal mines, regulation of production, annual basic tonnage	82
Collision, salvage, remuneration when salvage services by ship in same ownership as ship in collision	40
Commission, default of principal, amount recoverable	757
Committee of inspection, member a proxy of a limited company, fiduciary position	323

COMPANIES.

<i>Foreign company—Share register in England—Place of business—Service of writ—Companies Act, 1929 (c. 23), ss. 344, 349, 352 [THE MADRID].</i>	216
<i>Power to borrow—General power in memorandum of association—Power given to directors in articles of association—Delegation of borrowing power by company—Validity—Ostensible authority—Letter of hypothecation—Charge on produce in go-downs—Produce in go-downs fluctuating—Floating charge—Unregistered charges—Effect of seizure before liquidation [MERCANTILE BANK OF INDIA, LTD. v. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND STRAUSS & CO. LTD. (IN LIQUIDATION), CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO. LTD. (IN LIQUIDATION)].</i>	231
<i>Private company—Balance sheet—Part of loan repaid—Agreement with directors that full loan provable in winding-up—Whether release [Re GENERAL PRESERVING CO., LTD.]</i>	693
<i>Directors—Service agreement for term of years—Termination on vacation of office—Re-election opposed by governing director at first ordinary general meeting—No re-election—Vacation of office—Wrongful dismissal—Table A, art. 73 WALKER v. KENNS, LTD.]</i>	566
<i>Sale of shares—Deposit—Condition of solvency—Ascertainment of solvency [DIAMANTIDI v. GROSVENOR SECURITIES, LTD. AND THE GUILDHALL TRUST, LTD.]</i>	703
<i>Scheme of arrangement—Release of joint debtor—No reservation of creditors' rights against joint debtors—Companies Act, 1929 (c. 23), s. 153 [Re GARNER MOTORS, LTD.]</i>	671
Conditions, road service licence	264
Condition of sale, misleading, waiver . .	782

CONFLICT OF LAWS.

<i>Jurisdiction of court—Nullity—Bigamy—Woman petitioner domiciled in England—Ceremony in Australia—Respondent neither resident nor domiciled in England—No appearance by respondent [WHITE (OTHERWISE BENNETT) v. WHITE]</i>	708
<i>Stay of proceedings—Admiralty action—Lis alibi pendens—Whether bar to proceedings in England [THE MADRID]</i>	216

CONTRACT.

<i>Joint debtors—Release of one—Release by operation of law—Effect of [Re GARNER MOTORS, LTD.]</i>	671
Contract, breach of, committed within the jurisdiction, service out of the jurisdiction	23
—, entire, retainer of solicitor, succession of matters, termination	562
Conversion, assessment of damages for, limitation of action	338
Conveyance on sale, stamp duty, series of transactions	27
Cooking-class, no guard on gas-cooker, negligence	617

COPYRIGHT.

<i>Infringement—Conversion—Limitation of action—Assessment of damages for conversion—Copyright Act, 1911 (c. 46), s. 10 [SUTHERLAND PUBLISHING CO., LTD. v. CAXTON PUBLISHING CO., LTD. (No. 2)]</i>	338
Corroboration, evidence of exceeding speed-limit, speedometer	527
Costs, payment into court with denial of liability, costs after payment in	222
Cotton-mill, basis of assessment of rates	11
Counters or chips, supply by club, loan of money	178
County court, remitting action for personal injuries	301
County valuation officer, right to attend assessment committee meetings	403
Covenant, quiet enjoyment, breach, demolition under dangerous structure notice	167

CRIMINAL LAW.

<i>Reckless or dangerous driving—Indictment of manslaughter—Verdict of guilty of reckless or dangerous driving—Whether distinction in degree of negligence—Road Traffic Act, 1934 (c. 50), s. 34 [R. v. LEACH]</i>	319
Currency, debenture bond and coupons, option of holder to be paid in London or New Zealand	645
Damages, alteration of amount in formal judgment	736
Damages for conversion, assessment of . .	338
Dangerous machinery, criterion of danger —, fencing, injury to workman	170
Dangerous or reckless driving, indictment of manslaughter, whether difference in degree of negligence	319
Dangerous structure, demolition, suspension of rent	167
Debenture, option to be paid in England or New Zealand, currency	645
Debt not in respect of business, guaranteed by wife before passing of Law Reform (Married Women and Tortfeasors) Act, 1935, payment after —, owing to estate by beneficiary taking protected life interest	244
—, whether released by taking security from son after execution of will	244
Deceased person, appointment of representative, consent	473
Deduction of tax, arrears of annuity under separation deed, set-off	404
Default, balance due on, evidence of value of specific articles	442
Delegation of borrowing power by company, validity	231
Demolition, dangerous structure, suspension of rent	167
Demonstrative legacy, payable out of share of partnership	602
Denial of liability, payment into court with costs	222
Deposit, return of, agreement to purchase leaseholds, inability to secure lessor's consent	513
Directors of private company, service agreement for term of years, no re-election, vacation of office, wrongful dismissal	566
—, power to borrow in articles of association, delegation of borrowing power by company	231
Discretion, divorce, prostitution	779
Disposition by seller in possession, transfer of title to goods	420, 799

DIVORCE.

<i>Nullity—Wife's petition—Incapacity of husband—Children born in wedlock—Wife's evidence as to paternity—Admissibility [BURGESS (OTHERWISE LEADBETTER) v. BURGESS]</i>	374
---	-----

	PAGE
<i>Wife's petition—Petitioner's adultery—Prostitution—Husband conducting adultery—Discretion</i> [SHELDON v. SHELDON (TOWNLEY FORMERLY MURRAY INTERVENING)]	779
Dock authority, liability of, dock-master's order when ship leaving dock, collision	191
Documents of title, return to mortgagor, statute-barred mortgage	530
Duplicity, information giving three dates	309
Duties of trustees, beneficiary absolutely entitled, transfer of trust estate	368
Duty to exercise care, hairdresser, permanent waving, bleached hair	331

EASEMENTS.

<i>Light—Statutory right—Prevention of acquisition—Agreement or consent in writing—Prescription Act, 1832 (c. 71), s. 3</i> [WILLOUGHBY v. ECKSTEIN]	257
<i>Right of Way—"As at present enjoyed"</i> [HURT v. BOWMER]	797
Easements, right to let down surface in mining lease	86

ECCLIESIASTICAL LAW.

<i>The Church in Wales—Existing interests at passing of Welsh Church Act, 1914—Holder of ecclesiastical office—Annuity—Appointment to new office with special stipend—Rights of holder of office—Welsh Church Act, 1914 (c. 91), s. 18 (e)</i> [PRICE v. REPRESENTATIVE BODY OF THE CHURCH IN WALES]	387
--	-----

EDUCATION.

<i>Local education authority—Negligence—Children—Cooking-class—Gas-cooker—No guard</i> [FRYER v. SALFORD CORPORATION]	617
Election, workmen's compensation and common law action	658
Employers' liability, accident to servant, "works"	576
Equitable addition or deduction, annual basic tonnage	82

ESTATE AND OTHER DEATH DUTIES.

<i>Succession duty—Predecessor—Settlement by party with defeasible estate and party with contingent interest subject thereto—Succession Duty Act, 1853 (c. 51), s. 2</i> [Re DRAKE SETTLEMENT TRUSTS, WILSON v. DRAKE]	286
Estoppel, statutory charges, incorrect account, public utility company	748
Eviction by title paramount, demolition as dangerous structure	167
Evidence, admissibility, statements in will as to legitimacy	130
—, agency in publication of slander	115
—, exceeding speed-limit, corroboration, speedometer	527
—, paternity, admissibility, incapacity of husband	374
—, promissory notes not in prescribed form, inadmissible to prove loan	196
Excavator, necessity for fencing	170

EXECUTORS.

<i>Guarantee by testatrix of son's debt—Son appointed executor—Son also beneficiary under will—Security taken from son after execution of will—Whether debt released</i> [Re EISER'S WILL TRUSTS, FOGG v. EASTWOOD]	244
<i>Legacies—Demonstrative legacy—Legacy payable out of share of partnership</i> [Re WEBSTER, GOSS v. WEBSTER]	602

FACTORIES AND SHOPS.

<i>Dangerous machinery—Fencing—Unfenced pinion-wheels—Injury to workman—Factory and Workshop Act, 1901 (c. 22), s. 10 (1) (c.)</i> [CHASTENEY v. MICHAEL NAIRN & CO., LTD.]	376
---	-----

	PAGE
<i>Unfenced wheel of excavator—Criterion by which danger determined—Factory and Workshop Act, 1901 (c. 22), s. 10</i> [WALKER v. BLETHLEY FLETTONS, LTD.]	170
<i>Factory—Addition to switchboard—Not handed over by contractor as complete—Responsibility of owner as "occupier"</i> [TURNER v. COURTAULDS, LTD.]	467
Fair wear and tear, deterioration by wind and rain	590
Fencing, dangerous machinery, injury to workman	376
—, machinery, when necessary	170
Fictitious payee, cheque, statutory protection	183
Fiduciary position of proxy of limited company as member of committee of inspection	323
Flood, river wall, out of repair	765
Football pool on credit basis, breach of instructions by collector	315
Forfeiture, protected life interest, improvements	399
Foundation, extension of, beyond wall, trespass	222

GAMING AND WAGERING.

<i>Betting house—Receiving money on deposit—Information giving three dates—Duplicity—"Deposit"—Summary Jurisdiction Act, 1848 (c. 43), s. 10—Betting Act, 1853 (c. 119), s. 4</i> [JOEL v. BARCLAY]	309
<i>Club—Card-games—Counters sold on credit to member—Winner paid by club on behalf of loser—Action by proprietor of club against loser for amounts so paid and price of counters—Gaming Act, 1845 (c. 109), s. 18—Gaming Act, 1892 (c. 9), s. 1</i> [WOOLF v. FREEMAN]	178
<i>Football pool on credit basis—Ereath of instructions by collector</i> [WILSON v. MURPHY]	315
Gas-cooker, no guard, cooking-class	617
Gold clause, rent reserved in pesos of certain weight in gold	206
Goods vehicle, record of hours worked, agricultural lorry	495
Grant by owner of quarry, right to work in proper manner	137
Guarantee by testatrix of son's debt, son appointed executor and also beneficiary under will, security taken from son after execution of will, whether debt released	244
—, by wife before passing of Law Reform (Married Women and Tortfeasors) Act, 1935, payment after	1
Hairdresser, negligence, permanent waving, duty to exercise care	331

HIGHWAY.

<i>Metropolis—Streets—Erection of dead shores—Without leave or licence from local authority—Hoards or scaffolding—Metropolitan Paving Act, 1817 (c. xxix), s. 75—Metropolis Management Act, 1855 (c. 120), ss. 122, 123</i> [SMITH v. BENABO]	523
Highway, repair of, declaration, jurisdiction of Railway and Canal Commission court	507
—, severance by strip, bridge over, carrying cables and mains over bridge	489

HIRE-PURCHASE.

<i>Financing agreement—Misrepresentation of price by seller—Sale of used car represented as new car—Fraud</i> [UNITED MOTOR FINANCE CO. v. ADDISON & CO., LTD.]	425
Hoarding, shore, necessity for licence	523

	PAGE
HUSBAND AND WIFE.	
<i>Liability of husband—Wife's tort—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), ss. 3, 4 (1) (b) [BARBER v. PIGDEN]</i>	115
<i>Separation agreement—Payments without deduction of income tax—Arrears—Arrears exceeded by income tax which could have been deducted—Set-off [TAYLOR v. TAYLOR]</i>	464
<i>Implied contract—grant from owner creating nuisance</i>	137
<i>Improvements, rentcharge to secure repayment, forfeiture of life interest</i> ..	399
<i>Income, right to trustees to apply for maintenance of beneficiary, debtor to the estate before debt repaid</i> ..	244
<i>Income fee, bank-trustee, incidence</i> ..	518
INCOME TAX	
<i>Income under Sched. E—Rent-free occupation of house—Minister of religion [REED v. CATTERMOLE (INSPECTOR OF TAXES)]</i> ..	541
<i>Mining lease—Right to let down surface—Easement—Finance Act, 1934 (c. 32), s. 21 [INLAND REVENUE COMRS. v. NEW SHARLTON COLLIERIES CO., LTD.]</i> ..	86
<i>Subsidy received by sugar manufacturers from Government—Whether amount of subsidy liable to income tax—Trade receipts—"Advances"—British Sugar (Subsidy) Act, 1925 (c. 12)—British Sugar Industry (Assistance) Act, 1931 (c. 35) [LINCOLNSHIRE SUGAR CO., LTD. (IN LIQUIDATION) v. SMART (H.M. INSPECTOR OF TAXES)]</i> ..	413
<i>Sur-tax—Deduction—Annuity—Deficiency of income from fund appropriated—Made up by advance charged on residue—Income Tax Act, 1918 (c. 40), s. 27 (1) (b) [BOWEN v. INLAND REVENUE COMRS.]</i> ..	607
<i>Income tax, set-off, arrears under separation deed</i> ..	464
<i>Indorsement, forged, statutory protection</i> ..	183
<i>Industrial hereditament, rating, freight transport hereditament, wharf, dock undertaking</i> ..	461
INDUSTRIAL SOCIETY.	
<i>Rules—Validity—Allocation of part of profits to political fund—Industrial and Provident Societies Act, 1893 (c. 39), s. 10 (6) [CAHILL v. LONDON CO-OPERATIVE SOCIETY, LTD.]</i> ..	631
<i>Infant, dependants claiming compensation, widow proceeding under Fatal Accidents Act.</i> ..	658
<i>—, licensee, negligence, accident in recreation ground</i> ..	333
<i>Injury to workman, dangerous machinery, fencing</i> ..	376
<i>Instalments, payment by, specific articles</i> ..	461
INSURANCE.	
<i>Marine insurance—Barratry—Actual total loss—Constructive total loss—True facts at time of abandonment—Marine Insurance Act, 1906 (c. 41), ss. 57, 60 (1), (2) (i) [MARSTRAND FISHING CO., LTD. v. BEER]</i> ..	158
<i>Motor vehicle insurance—Passenger on private car—Payment for journey—Private car policy—Compulsory third party insurance—Road Traffic Act, 1930 (c. 43), s. 36 (1) [WYATT v. GUILDHALL INSURANCE CO., LTD.]</i> ..	792
<i>Payment as for total loss—Salvage—Subrogation—Contribution to underwriters of increased value policies [BOAG v. STANDARD MARINE INSURANCE CO., LTD. (BODEY, JERRIM & DENNING, LTD. v. PENTIRION STEAMSHIP CO., LTD.)]</i> ..	714
<i>Interest, compound, moneylending transaction</i> ..	380

	PAGE
<i>Joint debtors, scheme of arrangement, whether release</i> ..	671
<i>Jurisdiction, nullity suit, void marriage— of court to re-open money-lending transaction, Ceylon.</i> ..	196
<i>—, of Divisional Court, interlocutory and final appeals, Master's discretion</i> ..	357
<i>—, Railway and Canal Commission court, declaration as to repair of highway</i> ..	507
<i>—, Railway Assessment Authority</i> ..	431
<i>—, road service licence.</i> ..	264
<i>—, service of writ out of, breach of contract committed within.</i> ..	23
<i>Jury, right to, discretion of court</i> ..	625
<i>Jus tertii, money recovered by agent</i> ..	497
<i>Keeney v. Attrill, order in form in, priority</i> ..	276
<i>Knowledge of owner of use to which stage carriage put, separate payments by passengers, stage carriage, no road service licence.</i> ..	349
<i>Land drainage, rateability of tidal lands</i> ..	436

LANDLORD AND TENANT.	
<i>Agreement to purchase leaseholds—Assignor to use best endeavours to obtain landlord's consent—Alternatively option to take a declaration of trust or direct method of dealing with property—Landlord's consent refused—Refusal to exercise option—Breach of contract—Return of deposit [PINCOTT v. MOORSTONS, LTD.]</i> ..	513
<i>Rent—Suspension of rent—Eviction by title paramount—Demolition under dangerous structure notice—Frustration of lease—Breach of covenant of quiet enjoyment [POPULAR CATERING ASSOCIATION, LTD. v. ROMAGNOLI]</i> ..	167
<i>Repair—Landlord's covenant—Exception of fair wear and tear—Deterioration by wind and rain—Non-repair—Consequential damage—Liability of landlord [TAYLOR v. WEBB]</i> ..	590
<i>Lease, frustration of, demolition as dangerous structure</i> ..	167
<i>—, governed by Chilean law, money, rent reserved in pesos of a certain weight in gold, "remit"</i> ..	206
<i>—, mining, right to let down surface, easement.</i> ..	86
<i>Leasing, power of, lease granted by mortgagor without consent.</i> ..	481
<i>Legacies, trust in settlement to pay, legatees predeceasing testator,</i> ..	571
<i>Legacy, demonstrative, payable out of share of partnership</i> ..	602
<i>Legitimacy, rule in Russell v. Russell</i> ..	130
<i>Letter of hypothecation, by company, floating charge on produce in go-downs</i> ..	231
<i>Liability of husband for wife's tort.</i> ..	115

LIBEL.	
<i>Award—Several allegations on separate occasions—Single verdict—Validity—Publication—Agency—Evidence [BARBER v. PIGDEN]</i> ..	115
<i>Privilege—Reports—Judicial proceedings—Interruption—Application—R.S.C., Ord. 39, r. 6—Law of Libel Amendment Act, 1888 (c. 64), s. 3 [FARMER v. HYDE]</i> ..	773
<i>License, of landlord to assign, special provision, right to rescind agreement.</i> ..	513
<i>—, road service, backing, restrictions.</i> ..	264
<i>Licensee, infant, negligence</i> ..	333

LIMITATION OF ACTIONS	
<i>Statutory bar—Amendment of pleadings after expiration of statutory period—Sunday Observance Act, 1780 (c. 49), s. 5 [GREEN v. KURSAAL (SOUTHEND-ON-SEA) ESTATES, LTD.]</i> ..	732
<i>Limitation of action, infringement, conversion</i> ..	338

	PAGE
Liquidation, seizure before, unregistered floating charge	231
<i>Lis alibi pendens</i> , Admiralty action, whether bar to proceedings in England	216
Loans, gaming purposes, money paid to winner on behalf of loser	178
—, promissory notes not in prescribed form inadmissible in evidence	196
Loss, actual total, marine insurance, barratry	158
—, constructive total, marine insurance, barratry	158
Loudspeaker in tenant's flat, liability of tenant to take out wireless licence	585
Maintenance, trustees' right to apply income for, of beneficiary debtor to the estate before debt repaid	244
Manslaughter, indictment of, reckless or dangerous driving, whether difference in degree of negligence	319
Marriage, void, bigamy, nullity suit, jurisdiction	708
MASTER AND SERVANT.	
Liability of master—Accident to servant—"Works"—Employers' Liability Act, 1880 (c. 42), s. 1 (1) [HUNT v. RICE & SON, LTD.]	576
Seduction—Daughter—Father and mother not married—Effect on action by father—Master of the house [BEETHAM v. JAMES]	580
Master of the house, services rendered to, seduction	580
Master's discretion, statute-barred claim, reply to defence, out of time, interlocutory and final appeals	357
Medical referee, terms of reference	676
Membership, fluctuating, unincorporated association, action for goods supplied, representation order	75
Memorandum, moneylender's contract	380
Mental patient, married woman, settlement of husband,	559
MINES.	
Application for ancillary rights for working a quarry—Jurisdiction of Railway and Canal Commission court—Declaration—Repair of highway—Mines (Working Facilities and Support) Acts, 1923 and 1925 [RE AN APPLICATION BY T. RYAN SOMERVILLE & CO., LTD.]	507
Coal mines—Regulation of production—Scheme—Annual basic tonnage—Equitable addition or deduction—"Trade of the mine" [RE FOREST OF DEAN DISTRICT (COAL MINES) SCHEME, 1930, CANNOP COLLIERY CO., LTD. v. THE EXECUTIVE BOARD]	82
Mining lease, right to let down surface, easement	86
Minister, house of, rent-free occupation, income tax	541
Miscarriage of justice, substantial, no opportunity to jury to assess damages	773
Misrepresentation of price by seller, sale of used car represented as new car	420
MONEY.	
Lease—Governed by Chilean law—Rent reserved in pesos of a certain weight in gold—"Remit" [ST. PIERRE v. SOUTH AMERICAN STORES (GATH & CHAVES), LTD.]	206
Money, received on deposit, "deposit," betting stake	309
—, recovered by agent, duty to account to principal, <i>ius tertii</i>	497
MONEYLENDING.	
Memorandum—Actual rate stated—Installments—Allocation to principal and interest—Interest upon interest—Money-lenders Act, 1927 (c. 21), ss. 6 (2), 7, 15 (2) [MUTUAL LOAN FUND ASSOCIATION v. SANDERSON]	380

	PAGE
Moneylending, Ceylon, promissory notes not in prescribed form, unenforceable	196

MORTGAGE.

Discharge—By Statutes of Limitations—Return of documents of title to mortgagor [LEWIS v. PLUNKET]	530
Power of leasing—Restriction—Consent of mortgagee—Lease created without consent—Whether mortgagees entitled to regard themselves as no longer bound by their own covenants—Common-law power of leasing—Law of Property Act, 1925 (c. 20), ss. 99, 152 [IRON TRADES EMPLOYERS' INSURANCE ASSOCIATION v. UNION OF HOUSE AND LAND INVESTORS, LTD.]	481
Motor, third party insurance, paying passenger on private car	792
Motor-tractor, trailer, number of attendants	538
Name, geographical, trade mark, invented word	145

NEGLIGENCE.

Hairdresser—Permanent waving—Bleached hair—Duty to exercise care [DOBBIN v. WALDORF TOILET SALOONS, LTD.]	331
Invitee or licensee—Child—Paddling-pool provided by local authority—Plaintiff a child of a retpayer [ELLIS v. FULHAM BOROUGH COUNCIL]	698
Licensee—Infant—Recreation ground [COATES v. RAWTENSTALL BOROUGH COUNCIL]	333
Negligence, local education authority, cooking-class	617
—, whether distinction in degree of, verdict of guilty of reckless or dangerous driving, indictment of manslaughter	319
Neighbouring owner, nuisance, grant from owner creating nuisance	137
Newspaper, advertiser, Sunday entertainment	732
Notification to trustee, secret trust	452

NUISANCE.

Neighbouring owners—Injury to property—Distinction where injured property held under grant from owner of property on which nuisance exists—Implied agreement [THOMAS v. LEWIS]	137
Nullity, bigamous marriage, jurisdiction founded on residence	708
—, incapacity of husband, children born in wedlock, admissibility of wife's evidence of paternity	374
Occasions, separate, several allegations of slander on validity of single verdict	115
Occupation, beneficial, occupation of cotton-mill only for preservation, basis of rating assessment	11
—, cotton-mill occupied only for preservation, basis of assessment of rates for, beneficial occupation	11
—, rent-free, minister's house, income tax	541
Occupier, factory, unfinished work by contractor	467
Order, representation, parties, unincorporated association	75
Paddling-pool, injury to child, liability of local authority	698
Parties, representation order, unincorporated association	75

PARTNERSHIP.

Dissolution—Appointment of receiver—Fund in court—Charging orders on fund in court—Priority [NEWPORT v. PUGHIER]	276
Partnership, legacy payable out of share of, demonstrative legacy	602

	PAGE
Passenger on private car, payment, third party insurance	792
Payment after passing of Law Reform (Married Women and Tortfeasors) Act, 1935, by wife, under guarantee made before passing of Act	1
Payment, into court, communication to judge	736
Payment into court with denial of liability, costs, action	222
Payments, separate, by passengers, stage carriage, owner's knowledge of use to which vehicle put	349
Permanent waving, hairdresser's duty to exercise care	331

PERPETUITIES.

Accumulations—Will—Annuities payable out of residue—Accumulation of surplus income—Residuary legacy after death of last annuitant—Determination of trust for accumulation of surplus—Law of Property Act, 1925 (c. 20), s. 164 [RE BLAKE, BERRY & GEEN]	742
Personal injuries, death of negligent party, appointment of representative	473
—, remitting action to county court	301
Pledge, by vendor in possession	799
Political fund, industrial society	631

POOR LAW.

Settlement—Change of residence—Former place of residence transferred to other authority—“Immediately before”—Newport Extension Act, 1934 (c. lviii), s. 26 [NEWPORT BOROUGH COUNCIL v. LEICESTER COUNTY COUNCIL]	439
—, Status of irremovability—Mental patient—Married woman—Settlement of husband—Mental Treatment Act, 1930 (c. 23), s. 18 (1) (b) [ROCHDALE CORPORATION v. LANCASHIRE COUNTY COUNCIL]	559
Power of leasing, mortgagor, restriction on	481

PRACTICE.

Action for damages for negligence—Serious personal injuries alleged—Remitting action to county court—County Courts Act, 1919 (c. 73), s. 2 [CULVER v. BEARD]	301
Costs—Action—Payment into court with denial of liability—Lesser amount recovered at trial—Costs after payment in—R.S.C., Ord. 22 [WILCOX v. KETTEL]	222
Deceased person interested in action—Appointment of person to represent his estate—Necessity for consent—R.S.C., Ord. 16, r. 46 [PRATT v. LONDON PASSENGER TRANSPORT BOARD, GREEN v. VANDEKAR]	473
Parties—Representation order—Unincorporated association—Fluctuating membership—Action for goods supplied—R.S.C., Ord. 16, r. 9 [BARKER v. ALLANSON]	75
Payment into court—Communication to judge—Oral judgment giving damages—Disclosure of payment into court—Alteration of quantum of damages in formal judgment—Jurisdiction—R.S.C., Ord. 22, r. 5 [MILLENSTED v. GROSVENOR HOUSE (PARK LANE), LTD.]	736
Service out of the jurisdiction—Tort committed within the jurisdiction—Libel in foreign newspaper—Small circulation in England—Foreign plaintiff—No regulation in England—Substance of complaint—R.S.C., Ord. 11, r. 1 (ee) [KROCH v. ROSSELL ET COMPAGNIE SOCIÉTÉ DES PERSONNES A RESPONSABILITÉ LIMITEE, KROCH v. SOCIÉTÉ EN COMMANDITE PAR ACTIONS LE PETIT PARISIEN]	725

	PAGE
Statute-larred claim—Failure to deliver reply to defence—Master's discretion—Interlocutory and final appeals—Jurisdiction of Divisional Court [KRONSTEIN v. KORDA]	357
Trial by jury—Special jury—Right to—Discretion of court—Extent—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 6 [HOPE v. GREAT WESTERN RAILWAY CO.]	625
Writ—Service out of the jurisdiction—Breach of contract committed within the jurisdiction—R.S.C., Ord. 11, r. 1 (e) [OPPENHEIMER v. LOUIS ROSENTHAL & CO., AKT.]	23
Predecessor, succession duty, cesser of contingent interest before succession	286
Presumption, legitimacy, rebutting evidence	130
Price, misrepresentation of, by seller, sale of used car represented as new car	425
Price-maintained goods, abortive attempt to buy, recovery of purchase price	637
Principal, agent's duty to account to, money recovered by agent on behalf of principal, <i>ius tertii</i>	497
—, preventing agent earning commission, assessment of damages	757
Printed form of will, beneficiary's name inserted, bequest left blank	355
Priority, charge on partnership assets in dissolution action	276

PRIVY COUNCIL.

Canada—Estoppel—Public utility company—Compulsory statutory charges—Incorrect accounts rendered—Mistake—Public Utilities Act, (Revised Statutes of New Brunswick, 1927 (c. 127), ss. 10, 14, 15, 16, 18, 19 [MARITIME ELECTRIC CO., LTD. v. GENERAL DAIRIES, LTD.]	748
Canada—Provincial income tax—Deduction by employer from wages—Dominion civil servant—“Employee”—Occupied field—British North America Act, 1867 (c. 3), ss. 91, 92—Special Income Tax Act, 1933 (c. 44 (Manitoba)), ss. 2, 3, 4, 5, 6, 7 [FORBES v. ATTORNEY-GENERAL OF MANITOBA]	249
Ceylon—Moneylending—Mortgage—Security for payment of advances made upon promissory notes—Promissory notes not in prescribed form and therefore unenforceable—Inadmissible in evidence to prove the loans—Jurisdiction of court to reopen the transaction—Ceylon Money-lending Ordinance (No. 2 of 1918), ss. 2, 8, 10, 13, 14 [SOCKALINGAM CHETTIAR v. RAMANAYAKE]	196
New Zealand—Debenture bond and coupons payable at the option of the holder in London or Auckland—Currency in which such payments may be made—Local Bodies Loans Act, 1913 [AUCKLAND CITY COUNCIL v. ALLIANCE ASSURANCE CO., LTD.]	645
Proceedings, interruption in nature of application	773
—, stay of, <i>lis alibi pendens</i> , whether bar to proceedings in England	216
Production, regulation of, annual basic tonnage	82
Promissory notes not in prescribed form, unenforceable and inadmissible in evidence to prove loan	196
Prostitution, discretion in divorce	779
Protected life interest, forfeiture, rent-charge under Settled Land Act	399
Proxy of limited company, member of a committee of inspection, fiduciary position	323
Public utility company, statutory charges, incorrect account, estoppel	748
Publication of slander, agency, evidence	115

	PAGE
Railway Assessment Authority, jurisdiction	431

RATES AND RATING.

<i>Assessment committee meetings—Right of exclusion—County valuation officer—Rating and Valuation Act, 1925 (c. 90), ss. 17, 18 [MIDDLESEX COUNTY VALUATION COMMITTEE v. WEST MIDDLESEX ASSESSMENT AREA ASSESSMENT COMMITTEE]</i>	403
<i>Basis of assessment—Cotton-mill—Production discontinued—Occupation only for preservation of process machinery and plant—Beneficial occupation—Rating and Valuation Act, 1925 (c. 90), s. 24 [TOWNLEY MILL CO. (1919), LTD. (in Voluntary Liquidation) v. OLDHAM ASSESSMENT COMMITTEE]</i>	11
<i>Freight transport hereditament—Wharf—Premises forming part of dock undertaking—Industrial hereditament—Dock undertaking—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 5 (3) [SOUTHERN ESSEX ASSESSMENT COMMITTEE v. BETTY & TOM, LTD.]</i>	461
<i>Railway assessment authority—Jurisdiction—Valuation roll—Estimated relative values—Adjustment—Time for objection expired—Railways (Valuation for Rating) Act, 1930 (c. 24) [R. v. RAILWAY ASSESSMENT AUTHORITY, Ex p. SOUTHAMPTON CORPORATION]</i>	431
<i>Reckless or dangerous driving, indictment of manslaughter, whether difference in degree of negligence</i>	319
<i>Record of hours worked, goods vehicle, agricultural lorry</i>	495
<i>Recreation ground, negligence, infant, licensee</i>	333
<i>Redeemable stock, redeemed, redemption moneys placed on deposit, ademption</i>	227
<i>Release, joint debtor, scheme of arrangement</i>	671
<i>Remuneration, salvage, services by ship in same ownership as ship in collision</i>	40
<i>Rent, suspension of, demolition as dangerous structure</i>	167
<i>Repair, covenant to, exception of fair wear and tear, deterioration by wind and rain</i>	590
<i>Reports, judicial proceedings, privilege, libel</i>	773
<i>Representation order, unincorporated association, fluctuating membership</i>	75
<i>Residence, former place of residence transferred to other authority, settlement</i>	439
<i>Residuary estate, transference to legatee during continuance of annuity</i>	742
<i>Retainer, solicitor, succession of matters, entire contract, termination</i>	562

REVENUE.

<i>Stamp duty—Conveyance on sale—Series of transactions—Finance (1909-10) Act, 1910 (c. 8), s. 73 [A.-G. v. COHEN]</i>	27
<i>Right to let down surface, mining lease, easement</i>	86
<i>River bank, repair, liability for flood</i>	765
<i>Sale, conveyance on, stamp duty, series of transactions</i>	27

SALE OF GOODS.

<i>"Price-maintained" goods—"Stop list"—Attempted purchase by person on stop list—Purchase money paid—Refusal to deliver—Recovery of price—Illegality [BERG v. SADLER & MOORE]</i>	637
<i>Transfer of title—Disposition by seller in possession—Factors Act, 1889 (c. 45), s. 8 [UNION TRANSPORT FINANCE, LTD. v. BALLARDIE]</i>	420

	PAGE
<i>Transfer of title—Pledge by vendor in possession—Possession of agent—Warehouseman—Sale of Goods Act, 1893, s. 25 (1) [CITY FUR MANUFACTURING CO., LTD. v. FURENBOND (BROKERS) LONDON, LTD.]</i>	799

SALE OF LAND.

<i>Conditions of sale—Misleading condition—Slight inaccuracy—Waiver—Law Society's General Conditions of Sale, cl. 9 (4) [Re OSSEMSLEY ESTATES, LTD.]</i>	782
<i>Salvage, His Majesty's ships, special agreement</i>	49
<i>—, salvage services by ship in same ownership as ship in collision, remuneration</i>	40
<i>Scheme of arrangement, reservation of creditor's rights</i>	671
<i>Seduction, daughter, parents not married</i>	580
<i>Seizure before liquidation, effect of</i>	231
<i>Separation agreement, set-off of tax against arrears</i>	464
<i>Series of transactions, stamp duty, conveyance on sale</i>	27
<i>Service of writ, foreign company, share register in England</i>	216
<i>—, out of the jurisdiction, breach of contract committed within the jurisdiction</i>	23
<i>Service, out of jurisdiction, libel in foreign newspaper</i>	725

SETTLEMENT.

<i>Protected life interest—Forfeiture—Rent-charge to secure instalments in respect of improvements—Some improvements not within Settled Land Act, 1925 (c. 18), Sched. 3, Part 2—Settled Land Act, 1925 (c. 18), s. 85 [Re LIBERTY'S WILL TRUSTS, BLACKMORE v. STEWART LIBERTY]</i>	399
<i>Trust to pay legacies mentioned in will—Death of legatees before death of settlor—Rights of legatees [Re HALL'S SETTLEMENT (TRUSTS, SAMUELL v. LAMONT)]</i>	571
<i>Settlement, change of residence, former place of residence transferred to other authority</i>	439
<i>—, mental patient, married woman</i>	559
<i>Severance from highway, bridge erected to avoid, covenant to maintain</i>	489

SEWERS AND DRAINS

<i>Land drainage—Tidal lands—Rateability—Land Drainage Act, 1930 (c. 44), s. 77 [COLLARD v. RIVER STOUR (KENT) CATCHMENT BOARD]</i>	436
<i>Share register in England, foreign company, place of business, service of writ</i>	216
<i>Shares, sale of, condition of solvency, ascertainment of solvency</i>	703
<i>Ship leaving dock, collision, order of dockmaster, liability of dock authority</i>	191

SHIPPING.

<i>Collision—Salvage—Apportionment of blame—Salvage services by ship in same ownership as ship in collision—Remuneration [THE KAFIRISTAN]</i>	40
<i>—, Ship leaving dock—Order of dock master—Liability of dock authority—Maritime Conventions Act, 1911 (c. 57), s. 1 [THE ROCKABILL, KING ORRY (OWNERS) v. ROCKABILL (OWNERS) AND MERSEY DOCKS & HARBOUR BOARD, ROCKABILL (OWNERS) v. MERSEY DOCKS & HARBOUR BOARD]</i>	191
<i>Salvage—His Majesty's ships—Special agreement—Public policy—Merchant Shipping Act, 1894 (c. 60), s. 557—Merchant Shipping (Salvage) Act, 1916 (c. 41), s. 1 [ADMIRALTY COMRS. v. VALVERDA (OWNERS)]</i>	49

	PAGE
SOLICITORS.	
Retainer—Retainer to prosecute a succession of matters—Entire contract—Termination—Costs [WARMINGTONS v. MCMURRAY] ..	562
Son appointed executor, also beneficiary under will, son's debt guaranteed by testatrix, security taken from son after execution of will, whether debt released ..	244
Stage carriage, separate payments by passengers, owner's knowledge of use to which vehicle put ..	349
Stamp duty, conveyance on sale, series of transactions ..	27
STATUTE.	
Repeal—By implication—Alteration of penalties—Metropolitan Paving Act, 1817 (c. xxix), s. 75—Metropolis Management Act, 1855 (c. 120), ss. 122, 123 [SMITH v. BENABO] ..	523
Statute-barred claim, foreign plaintiff, dismissal of action on preliminary point of law ..	357
Stay of proceedings, <i>lis alibi pendens</i> , whether bar to proceedings in England ..	216
Stop list, attempted purchase by person on ..	637
STREET TRAFFIC.	
Goods vehicle—Record of hours worked—Agricultural lorry—Moving agricultural implements from one farm to another—Goods Vehicles (Keeping of Records) Regulations, 1935 (S.R. & O., 1935, No. 314), reg. 6 (3) (a) [FLATMAN v. POOLE, FLATMAN v. OATEY] ..	495
Motor-vehicle—Construction and use—Trailer attached—Additional person in attendance—Road Traffic Act, 1930 (c. 43), s. 17—Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77 [UNION CARTAGE CO., LTD. v. HEAMON, EGGLETON v. HEAMON] ..	538
Road service licence—Express carriage—Backing of licence—Conditions—Conditions affecting licence in <i>arex</i> in which it is granted—Jurisdiction of traffic commissioners—Jurisdiction of Minister of Transport on appeal—Road Traffic Act, 1930 (c. 43), ss. 72, 73, 81—Road Traffic Act, 1934 (c. 50), s. 40 [R. v. MINISTER OF TRANSPORT Ex p. VALLIANT DIRECT COACHES, LTD., R. v. TRAFFIC COMRS. FOR SOUTH EASTERN TRAFFIC AREA, Ex p. VALLIANT DIRECT COACHES, LTD.] ..	264
Speed limit—Evidence of exceeding—Corroboration—Road Traffic Act, 1934 (c. 50), s. 2 (3) [RUSSELL v. BEESLEY] ..	527
Stage carriage—No road service licence—Separate payments by passengers—Owner's ignorance of use to which vehicle put—Road Traffic Act, 1930 (c. 43), ss. 61, 72 (1), (10)—Road Traffic Act, 1934 (c. 50), s. 25 [EVANS v. DELL] ..	349
Streets, dead shores, hoards or scaffolding, necessity for licence ..	523
Subrogation, increased value policy ..	714
Subsidy received by sugar-manufacturers from government, whether liable to income tax ..	413
Succession duty, predecessor, joint settlors, one settlor's interest ceasing before succession taking effect ..	216
Sunday entertainment, advertising ..	732
Sur-tax, deduction, deficiency of annuity paid out of residue ..	607

	PAGE
TELEGRAPH.	
Wireless—Block of flats—Wireless receiving set installed by landlord—Loud-speaker in a tenant's flat—Liability of tenant for wireless licence—Wireless Telegraphy Act, 1904 (c. 24), s. 1 (3) [KING v. BULL] ..	585
Testatrix's guarantee of son's debt, son appointed executor and also beneficiary under will, security taken from son after execution of will, whether debt released ..	244
THEATRES AND ENTERTAINMENTS.	
Sunday entertainments—Advertising—Newspaper—Sunday Observance Act, 1780 (c. 49), s. 3 [GREEN v. KURSAAL (SOUTHEND-ON-SEA) ESTATES, LTD.] ..	732
Tidal lands, rateability ..	436
Title, transfer of, disposition by seller in possession ..	420
Title deeds, return of, statute-barred mortgage ..	530
Tort, husband's liability for wife's ..	115
TRADE MARK.	
"Livron"—Geographical name—Invented word—Trade Marks Acts (1905-1919), ss. 9, 11, 35—Trade Marks Act, 1919 (c. 15), s. 9 [Re THE APPLICATION OF THE SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC] ..	145
Trade receipts, subsidy received by sugar-manufacturers from government, whether liable to income tax ..	413
Trailer, necessity for attendant ..	538
Transactions, series of, stamp duty, conveyance on sale ..	27
Trench, building operations, employers' liability, "works" ..	576
TRESPASS.	
Adjoining buildings—Leave to underpin wall—Extension of concrete foundation beyond wall [WILCOX v. KETTEL] ..	222
Trial, jury, right to ..	625
Trust, primary, determined, debt owing to estate by beneficiary taking protected life interest ..	244
TRUSTS AND TRUSTEES.	
Bank—Express charging clause—Settled legacy—Income fee—Withdrawal fee—Incidence [Re ROBERTS'S WILL TRUSTS, YOUNGER v. LEWINS] ..	518
Duties of trustees—Beneficiary absolutely entitled—Transfer of trust estate [Re SANDEMAN'S WILL TRUSTS, SANDEMAN v. HAYNE] ..	368
Secret trust—Expressed in writing—Prior to date of will—Will referring to future notification to trustees—Validity [Re KREN'S ESTATE, EVERSHED v. GRIFFITHS] ..	452
Valuation officer, county, right to attend meetings of assessment committee ..	403
Valuation roll, jurisdiction of Railway Assessment Authority ..	431
Vendor, in possession, pledge by ..	799
Verdict, single, on several allegations on separate occasions, validity ..	115
Waiver, misleading condition of sale ..	782
Wall, underpinning works extended beyond, trespass ..	222
Way, as at present enjoyed ..	797
WATERS.	
River bank—Erected and maintained under statute—Wall substituted by private owner—Liability for maintenance of wall [GREENWOOD TILERIES, LTD. v. CLAPSON.] ..	765

	PAGE
Wharf, rating, freight transport hereditament, premises forming part of dock undertaking	461
Wife's tort, husband's liability for	115
WILL.	
<i>Adeption</i> —"Securities or investments representing the same if they have been converted into other holdings"—Redeemable stock—Redeemed—Redemption moneys placed on deposit [Re LEWIS'S WILL TRUSTS, O'SULLIVAN v. ROBBINS]	227
<i>Construction</i> —"All my home and personal belongings" [Re MILLS' WILL TRUSTS, MARRIOTT v. MILLS]	142
—, Intention of testator—Printed form of will—Beneficiary's name inserted—Bequest left blank [Re MESSENGER, CHAPLIN v. RUANE]	355
—, Legacy to "children of E. J. and M. J."—Whether child of E. J. alone included [Re LEWIS'S WILL TRUSTS, PHILLIPS v. BOWRETT]	556
Debt owing to estate by beneficiary taking protected life interest—Primary trust determined—Right to trustees to apply income for his maintenance before debt repaid [Re EISER'S WILL TRUSTS, FOGG v. EASTWOOD]	244
Will, secret trust, future notification	452
—, son executor and beneficiary, son's debt guaranteed by testatrix, security taken from son after execution of will, whether debt released	244
—, statement as to legitimacy, admissibility in evidence	130
Winding up, agreement to prove for full loan	693

	PAGE
Wireless receiving set, loudspeaker in tenant's flat, licence	585
Withdrawal fee, bank-trustee, incidence	518
Woman, married, bankruptcy, debt not in respect of business, guarantee by wife before Law Reform (Married Women and Tortfeasors) Act, 1935, payment after	1
Word, invented, trade mark, geographical name	145

WORKMEN'S COMPENSATION.

<i>Double remedy</i> — <i>Election</i> — <i>Infant dependants claiming compensation, widow proceeding under Fatal Accidents Act—Workmen's Compensation Act, 1925 (c. 84), ss. 8 (3) (ii), 29 [TAYLOR v. SIR WILLIAM ARROL & CO., LTD.]</i>	658
<i>Reference to medical referee</i> — <i>Report that wholly recovered from injury by accident but unfit for ordinary work—Further reference to referee as to whether condition attributable to accident—Whether arbitrator justified in ending compensation—Workmen's Compensation Act, 1925 (c. 84), s. 19 (2), (3), (4) [ROBERT ADDIE & SONS COLLIERIES, LTD. v. MCALLISTER, BURNS v. GARS-CUBE COLLIERY CO., LTD.]</i>	676
Writ, service of, foreign company, share register in England	216
—, out of the jurisdiction, breach of contract committed within the jurisdiction	23
Wrongful dismissal, directors, private company, vacation of office, no re-election	566

STATUTES, ETC., REFERRED TO

	PAGE
Sunday Observance Act, 1780 (c. 49), ss. 3, 5	732
Prescription Act, 1832 (c. 71), s. 3	257
Gaming Act, 1845 (c. 109), s. 18	178
Summary Jurisdiction Act, 1848 (c. 43), s. 10	309
Succession Duty Act, 1853 (c. 51), s. 2	286
Stamp Act, 1853, (c. 59), s. 19	183
Betting Act, 1853 (c. 119), s. 4	309
Metropolis Management Act, 1855 (c. 120), ss. 122, 123	523
British North America Act, 1867 (c. 3), ss. 91, 92	249
Employers' Liability Act, 1880 (c. 42), s. 1 (1)	576
Bills of Exchange Act, 1882 (c. 61), ss. 60, 79 (2), 82	183
Law of Libel Amendment Act, 1888 (c. 64), s. 3	773
Factors Act, 1889 (c. 45), s. 8	420
Gaming Act, 1892 (c. 9), s. 1	178
Industrial and Provident Societies Act, 1893 (c. 39), s. 10 (6)	631
Sale of Goods Act, 1893 (c. 71), s. 25 (1)	799
Merchant Shipping Act, 1894 (c. 60), s. 557	49
Factory and Workshop Act, 1901 (c. 22), s. 10	170, 376
Wireless Telegraphy Act, 1904 (c. 24), s. 1 (3)	585
Trade Marks Acts, 1905-1919, ss. 9, 11, 35	145
Marine Insurance Act, 1906 (c. 41), ss. 57, 60 (1) (2) (i)	158
Finance (1909-10) Act, 1910 (c. 8), s. 73	27
Copyright Act, 1911 (c. 46), s. 10	338
Maritime Conventions Act, 1911 (c. 57), s. 1	191
Welsh Church Act, 1914 (c. 91), s. 18 (e)	387
Merchant Shipping (Salvage) Act, 1916 (c. 41), s. 1	49
Income Tax Act, 1918 (c. 40), s. 27 (1) (b)	607
Trade Marks Act, 1919 (c. 15), s. 9	145
County Courts Act, 1919 (c. 73), s. 2	301
Mines (Working Facilities and Support) Act, 1923 (c. 20)	507
British Sugar (Subsidy) Act, 1925 (c. 12)	413
Settled Land Act, 1925 (c. 18), s. 85	399
Law of Property Act, 1925 (c. 20), ss. 99, 152	481
—, s. 164	742
Workmen's Compensation Act, 1925 (c. 84), ss. 8 (3) (ii), 29	658
—, s. 19 (2), (3), (4)	676
Rating and Valuation Act, 1925 (c. 90), ss. 17, 18	403
—, s. 24	11
Mines (Working Facilities and Support) Act, 1925 (c. 91)	507

	PAGE
Moneylenders Act, 1927 (c. 21), ss. 6 (2), 7, 15 (2)	380
Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 5 (3)	461
Companies Act, 1929 (c. 23), s. 153	671
—, ss. 344, 349, 352	216
Mental Treatment Act, 1930 (c. 23), s. 18 (1) (b)	559
Railways (Valuation for Rating) Act, 1930 (c. 24)	431
Road Traffic Act, 1930 (c. 43), s. 17	538
—, s. 36 (1)	792
—, ss. 61, 72 (1) (10)	349
—, ss. 72, 73, 81	264
Land Drainage Act, 1930 (c. 44), s. 77	436
British Sugar Industry (Assistance) Act, 1931 (c. 35)	413
Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 6	625
Finance Act, 1934 (c. 32), s. 21	86
Road Traffic Act, 1934 (c. 50), s. 2 (3)	527
—, s. 25	349
—, s. 34	319
—, s. 40	264
Law Reform (Married Women and Tortfeasors, Act, 1935 (c. 30), ss. 3, 4 (1) (b)	75
—, s. 4 (1) (c)	1
Metropolitan Paving Act, 1817 (c. xxix), s. 75	523
Newport Extension Act, 1934 (c. lviii), s. 26	439
Local Bodies Loans Act (New Zealand), 1913	645
Ceylon Moneylending Ordinance (No. 2 of 1918), ss. 2, 8, 10, 13, 14	191
Public Utilities Act (Revised Statutes of New Brunswick), 1927 (c. 127), ss. 10, 14, 15, 16, 18, 19	748
Special Income Tax Act, 1933 (c. 44 Manitoba), ss. 2, 3, 4, 5, 6, 7	249
R.S.C., Ord. 11, r. 1 (e)	23
—, Ord. 11, r. 1 (ee)	725
—, Ord. 16, r. 9	75
—, Ord. 16, r. 46	473
—, Ord. 22	222
—, Ord. 22, r. 6	736
—, Ord. 39, r. 6	773
Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77	538
Goods Vehicles (Keeping of Records) Regulations, 1935 (S.R. & O., 1935, No. 314), reg. 6 (3) (a)	495
Law Society's General Conditions of Sale, cl. 9 (4)	782

WORDS AND PHRASES

	PAGE
Advances	413
All my home and personal belongings	142
As at present enjoyed	797
Deposit	309
Immediately before	439
Livron	145
Occupier	467
Remit	206
Securities or investments representing the same if they have been converted into other holdings	227
Solvency	703
Trade of the mine	82
Works	576

THE ALL ENGLAND LAW REPORTS ANNOTATED

Re A DEBTOR (No. 627 OF 1936).

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **November 27, December 18, 1936.**]

Bankruptcy—Married woman—Debt not in respect of business—Guarantee given in 1933—Payment under guarantee in 1936—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 4 (1) (c).

In 1933 the petitioning creditor guaranteed the bank overdraft of the debtor, who was a married woman and not a trader. In 1936 the bank required the petitioning creditor to pay under the guarantee. The petitioning creditor obtained judgment against the debtor for the amount so paid to the bank and in due course served a bankruptcy notice on her. The debtor failed to comply with the notice and the petitioning creditor thereupon served a bankruptcy petition :—

HELD : the implied undertaking by the debtor to repay to the petitioning creditor the money paid on her behalf arose at the time of the guarantee in 1933. The obligation was, therefore, one incurred in 1933, that is, before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, and the debtor could not be made bankrupt.

[EDITORIAL NOTE.] Before Aug. 2, 1935, a married woman could only be made bankrupt if she was carrying on a trade or business, but on and from that date she is subject to the bankruptcy law in all respects as if she were a *feme sole*. Nothing, however, is to enable any judgment or order against a married woman to be enforced in bankruptcy if it is in respect of a contract entered into, or debt or obligation incurred before Aug. 2, 1935, that is, the date of the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935. In the present case a debt of a married woman was at her request guaranteed before Aug. 2, 1935, but payment under the guarantee by the guarantor was not made till after that date. Clearly there was no debt before actual payment under the guarantee, but the court was of the clear opinion that there was a contract or obligation entered into at the time the debt was guaranteed at the request of the debtor, that is, before the passing of the above Act. The contract or obligation was one to indemnify the surety if at any time he or she should be called upon to pay under the guarantee. In coming to this view the court relied upon the cases of *Brittain v. Lloyd* (8) and *Butard v. Hawes* (6).

AS TO THE NATURE OF A SURETY'S OBLIGATION, see HALSBURY, Hailsham Edn., Vol. 16, p. 104, para. 111, AND FOR CASES, see DIGEST, Vol. 26, pp. 146, 147, Nos. 1099-1103. FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS)

Act, 1935, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 28, pp. 104-107.]

Cases referred to :

- (1) *Morrice v. Redwyn* (1731), 2 Barn. K.B. 26 ; 26 Digest 130, 937.
- (2) *Woffington v. Sparks* (1754), 2 Ves. Sen. 569 ; Digest Supp. A
- (3) *Re Richardson, Ex p. St. Thomas's Hospital (Governors)*, [1911] 2 K.B. 705 ; 5 Digest 673, 5958.
- (4) *Toussaint v. Martinnant* (1787), 2 Term Rep. 109 ; 26 Digest 131, 948.
- (5) *Re Mitchell, Freelove v. Mitchell*, [1913] 1 Ch. 201 ; 26 Digest 128, 915.
- (6) *Batard v. Hawes, Batard v. Douglas* (1853), 2 E. & B. 287 ; 26 Digest 145, 1080. B
- (7) *Collinge v. Heywood* (1839), 9 Ad. & El. 633 ; 26 Digest 241, 1881.
- (8) *Brittain v. Lloyd* (1845), 14 M. & W. 762 ; 12 Digest 520, 4325.
- (9) *Lampleigh v. Braithwait* (1615), Hob. 105 ; 12 Digest 522, 4341.
- (10) *Crampton v. Walker* (1860), 3 E. & E. 321 ; 26 Digest 138, 1021.
- (11) *Hamilton v. Goold* (1839), 1 I.L.R. 171 ; 6 Digest 40, case c.
- (12) *Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696 ; Digest Supp. C
- (13) *Angrove v. Tippet* (1865), 11 L.T. 708 ; 26 Digest 241, 1883.
- (14) *Re Fenton, Ex p. Fenton Textile Assocn., Ltd.*, [1931] 1 Ch. 85 ; Digest Supp.
- (15) *Exall v. Partridge* (1799), 8 Term Rep. 308 ; 26 Digest 131, 947.

APPEAL from an order made by MR. REGISTRAR PARTON on Sept. 21, 1936, dismissing a petition in bankruptcy presented by a judgment creditor against a debtor who was a married woman and not a trader. On May 28, 1936, the petitioning creditor obtained a judgment against the debtor for £528 4s. 9d., the amount of a repayment made on Feb. 21, 1936, by the creditor under a guarantee dated Sept. 7, 1933, given by her on behalf of the debtor to the debtor's bank. The debtor failed to comply with a bankruptcy notice, and the creditor presented a petition asking that a receiving order should be made against the debtor. At the hearing before the learned registrar the debtor opposed the making of a receiving order on the ground that at the time the obligation was incurred she was a married woman and not amenable to the bankruptcy law. The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4 (1) (c), which came into force on Aug. 2, 1935, brought married women within the bankruptcy jurisdiction, and the question at issue was whether the debt or obligation arose before or after the coming into force of that Act. The learned registrar held that the obligation was incurred before the passing of the Act, and although it did not ripen into a debt or right of action at law until after the passing of the Act, it nevertheless remained within the operation of the Act. He therefore refused to make a receiving order, and the creditor appealed. D

W. A. L. Raeburn for the creditor. E

G. F. Kingham for the debtor. F

Raeburn : In order to come within the exemption laid down in the Act, a married woman must show that an attempt is being made to G

H

enforce in bankruptcy a judgment or order obtained against her in respect of a debt or obligation incurred before Aug. 2, 1935. The present debt or obligation arose out of the payment of money for the use of the debtor on Feb. 21, 1936. Whatever obligation may have subsisted in equity before Aug. 2, 1935, was not the obligation in respect of which the judgment was obtained, and that is the only obligation to which it is necessary or proper to look when applying the provisions of the Act. The judgment was in no sense a judgment in respect of any obligation incurred before the passing of the Act; the obligation merely arose out of the payment. Before the payment was made, the surety could not have obtained anything but a declaration in equity that the debtor was liable and a direction that the debtor should pay the debt. This was not the right upon which the creditor obtained judgment, and no bankruptcy proceedings could have been maintained on it, as there would have been no monetary obligation on the debtor to the surety. There is no debt in law until the surety has paid, and then there is an obligation in respect of money paid for the use of the principal debtor to the principal creditor.

GREENE, L.J.: Suppose a contract is made in 1934 to pay £100 on the return of A. B. from Rome; A. B. returns in Sept., 1935, when the Act is in force, and there is default; does the Act apply?

Raeburn: Yes, if the contract was made directly by the party who was to pay the £100 and the party claiming the £100.

GREENE, L.J.: If two persons agree before the passing of the Act that if one is called upon to pay, and does pay, a particular debt, the other will indemnify him, and the payment giving rise to the indemnity is made after the Act; would not judgment on that contract be a judgment in respect of a contract entered into before the Act? From the beginning there is a contract between the principal debtor and the surety, that if the surety is called upon to pay, the principal debtor will reimburse him. Is not that an implied obligation arising from the very inception of the contract?

Raeburn: That implied obligation arises only out of the discharge. There is an equitable liability. The principle is clearly stated in *Re Mitchell* (5). It is, however, much older, and formed the basis of the decision in *Collinge v. Heywood* (7): See also *Angrove v. Tippet* (13). The right of a surety against the principal debtor before the surety has discharged the debt is an equitable right only: *Re Fenton* (14). In *Re Richardson* (3) FLETCHER MOULTON, L.J., said that the common law will not help a man to make profit out of what is merely an indemnity. If he wants to sue the principal debtor, he must show that he has paid the debt.

Kingham: The claim is in respect of this sum of money paid to the plaintiff for the use of the defendant. The particulars show that it is

payable to the bank under a guarantee in writing dated Sept. 7, 1933. That shows the implied obligation. The creditor gets the right to sue for money paid to the use of the debtor under the implied obligation or contract of the principal debtor to repay to the surety what he is called upon to pay. Reference must be made throughout to the original obligation which was incurred in 1933. The law is correctly stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 16, p. 101, para. 111. The liability arises from the implied contract entered into at the time the guarantee was given. The money claimed here has been paid by the plaintiff for the use of the defendant, but the creditor shows in her particulars that she is in fact suing because she has had to pay moneys to a third party under a guarantee given by her. A B

ROMER, L.J. : In such a form of action as this, the plaintiff must show that he has paid the money at the request of the defendant, or that he has been compelled to pay, the obligation to pay having been incurred at the request of the defendant. The present creditor shows by her particulars that she is compelled to pay since she has guaranteed the debtor's banking account. Where a debtor guarantees a debt at the request of the debtor, then, if he is called upon by the principal creditor to pay and does pay, he does not have to allege in this form of action that the actual payment was made at the request of the debtor : *Exall v. Partridge* (15). C D

Kingham : The plaintiff does not have to allege the request, but she has to go back to the original contract in order to make the defendant liable. If the guarantee had been given voluntarily without any request, then clearly the defendant would have an answer. Here the guarantee was given at the request of the debtor, and therefore, although the action is brought for money paid by the plaintiff for the use of the defendant, the court must take into account the fact that the payment arose under a guarantee given at the request of the debtor, and that therefore there was an obligation under the Law Reform Act, 1935, s. 4 (1) (c), which prevents bankruptcy proceedings being commenced against the debtor. This judgment was obtained against the debtor in respect of an obligation entered into in 1933. The creditor's rights depend upon that implied obligation. If a stranger had paid the bank, he would have had no right of action, even on a claim for money paid for the use of the debtor. The important fact is the consent to or request for the payment, and that is the foundation of the debt or obligation : HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 16, p. 101, para. 111. E F G

Raeburn in reply. H

SLESSER, L.J. : This case raises a nice question of law. Before the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman could be made bankrupt only if she were carrying on

a trade or business—Bankruptcy Act, 1914, s. 125—but now, by sect. 1 (d) of the 1935 Act, to which I have referred, a married woman is subject to the law relating to bankruptcy in all respects as if she were a *feme sole*. By sect. 4 (1), however, it is provided that nothing shall :

- A (c) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property.

In the present case, on Sept. 7, 1933, the petitioning creditor had guaranteed money borrowed from the bank by the debtor. In Jan., 1936, the debtor made default in payment of the amount borrowed from the bank, and the bank called upon the guarantor to pay under the terms of the guarantee. Thereafter, on Feb. 21, the guarantor discharged the debt due to the bank, and on May 20, 1936, issued a writ against the debtor in respect of the money which had been paid by the guarantor, claiming £523 4s. 9d.—money paid by the guarantor for the use of the principal. The sum claimed was composed, as to £470, the amount owing under the guaranteed account, and the remainder interest and bank charges. On May 28, 1936, the guarantor obtained judgment by default for this sum, together with costs amounting to some £530 in all.

D The debtor has failed to comply with a bankruptcy notice in respect of this debt, and the matter now to be decided is whether or not, in the circumstances, she can, on the motion of the petitioning creditor—the guarantor—be made a bankrupt.

- The answer to this question depends upon whether under the terms of sect. 4 (1) (c) of the 1935 Act before-mentioned, this judgment against the married woman is or is not in respect of a contract entered into or debt or obligation incurred before the passing of the Act, namely, before Aug. 2, 1935 ; the guarantee, as I have said, having been given in 1933. On the other hand the date of payment to the bank by the guarantor was Feb. 21, 1936—that is, after the passing of the 1935 Act. The neat problem arises whether in these circumstances, was the judgment of May 28, 1936, given in respect of a contract entered into or debt or obligation incurred before or after the passing of the 1935 Act ?

- The guarantee, which here must be considered, is in the usual form.
- G The surety undertakes that she will guarantee the bank of payment of, and on demand in writing made pay, all the sums of money which then or thereafter may from time to time become due from the principal, not exceeding £500, and, on this, has to be determined what, in law, is the exact nature of the right of the surety against the principal. There is
- H no doubt that a surety paying a debt is entitled to recover against the principal, as for money paid to his use : *Morrice v. Redwyn* (1), *Woffington v. Sparks* (2) ; in the words of COZENS-HARDY, M.R., in *Re Richardson* (3), at p. 709 :

It is settled at common law that, given a contract of indemnity, no action could

be maintained until actual loss had been incurred. The common law view was first pay and then come to the court under your agreement to indemnify.

This is the basis of an implied promise to pay.

As ASHHURST, J., says in *Toussaint v. Martinnant* (4), at p. 104,

There is no doubt but that where a person gives a security, by way of indemnity for another, and pays the money, the law raises an *assumpsit*. A

And, in the same case BULLER, J., points out that in ancient times no action could be maintained at law where a surety had paid the debt of his principal, but that now the law raises such a promise where the creditor does not choose to take a security. PARKER, J., in the case of *Re Mitchell* (5) speaks to the same effect when he says at p. 206 : B

Until the surety is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all ; until then, a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the creditor. C

Although no question arises that there is no enforceable debt at law which can be enforced by the surety until the surety, being liable and obliged to pay, does pay the creditor (an event which here happened after the passing of the 1935 Act), it by no means follows that the obligation of the principal does not in appropriate circumstances arise by an implied agreement at the time of the giving of the guarantee that the principal, it and when the guarantor is called upon to pay, will indemnify the guarantor, though the event which gives rise to the enforceability of the promise falls later. Such a request may be "implied by law from the fact of entering into the engagement" : per LORD CAMPBELL, C.J., in *Batard v. Hawes* (6), at p. 296. It was always within the power of the court in equity to declare a right to indemnity by a guarantor even before the guarantor was called upon to make payment where the guarantor's liability to pay had become absolute. He was entitled to maintain an action against the principal debtor and to obtain an order that he should pay off the creditor and relieve the surety : see COZENS-HARDY, M.R., in *Re Richardson* (3), at p. 709 ; or a declaration that a guarantor was entitled to indemnity could in appropriate cases be obtained. D E F

In the present case, the implied undertaking of the principal debtor to repay the money paid on his behalf to the creditor arose at the time of the guarantee. The contract to indemnify is distinguishable from the cause of action : see LITTLEDALE, J., in *Collinge v. Heywood* (7), at p. 640. In other cases, it may well be that the implied request which supports the action may arise at a later period ; it is a question of fact, but here no request has been or can be suggested other than that which arose at the time of the guarantee. The obligation of the guarantor, though for a time at common law inchoate and unenforceable, had its origin in 1933 before the passing of the 1935 Act. G H

It follows, therefore, that the contract or obligation in respect of which judgment was given existed before the passing of the 1935 Act, and, therefore, that the married woman debtor, not being a trader, cannot be made bankrupt and that this appeal fails.

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ROMER, L.J. : I have had the privilege of reading the judgment which has just been delivered by SLESSER, L.J., and also that about to be delivered by GREENE, L.J. For the reasons given in those judgments I agree that this appeal fails and must be dismissed.

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GREENE, L.J. : By a document in writing dated Sept. 7, 1933, the petitioning creditor guaranteed the debtor's banking account with Barclays Bank up to the sum of £500. Upon the hearing of the petition, the learned registrar found that this guarantee was given at the request of the debtor, and this finding is not challenged. On Feb. 21, 1936, the petitioning creditor paid the amount then due from the debtor to the bank as she was bound to do, and on May 28, 1936, she recovered judgment against the debtor in the King's Bench Division for the amount so paid with costs. It is upon this judgment debt that the petition is founded.

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The debtor is and was at all material times a married woman. Between the date when the guarantee was given and the date when the petitioning creditor paid the bank, namely, on Aug. 2, 1935, the Law Reform (Married Women and Tortfeasors) Act, 1935, came into force. By sect. 1 (d) of this Act a married woman is made subject to the bankruptcy law in all respects as if she were a *feme sole*, but sect. 4 (1) provides as follows :

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Nothing in this part of this Act shall . . . (c) enable any judgment or order against a married woman in respect of a contract entered into, or debt or obligation incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property.

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It is contended by the debtor that the case is covered by this saving clause in that the judgment was "in respect of a contract entered into or debt or obligation incurred" before the passing of the Act, namely, on Sept. 7, 1933, when the guarantee was given. It is contended by the petitioning creditor on the other hand, that the relevant date is the date of payment to the bank, namely Feb. 21, 1936. The learned registrar held that the debtor's contention was well founded upon the ground as stated by him :

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that immediately a surety assumes liability to a creditor under a guarantee entered into by him at the request of the principal debtor, an obligation to indemnify the surety is incurred by the principal debtor.

I will state my reasons for agreeing with the decision of the learned registrar. It is, in my opinion, settled beyond possibility of dispute that where "A." at the request of "B." guarantees payment of "B.'s"

debt to "C," the law implies an undertaking by "B." to indemnify "A." in respect of any sums which he properly pays to "C." under the guarantee. This is merely a branch of a wider rule which is laid down in numerous authorities. I may quote as examples *Brittain v. Lloyd* (8), where, at p. 773, POLLOCK, C.B., says :

It is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid . . . the request to pay, and the payment according to it, constitute the debt ; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference ;

and *Batard v. Hawes* (6), at p. 296, where LORD CAMPBELL, C.J., said :

To support the action for money paid, it is necessary that there should be a request from the defendant to pay, either express or implied by law. Where one party enters into a legal liability for and at the request of another, a request to pay the money is implied by law from the fact of entering into the engagement ; and, if the debt or liability is incurred entirely for a principal, the surety, being liable for him at his request, and being obliged to pay, is held at law to pay on an implied request from the principal that he will do so.

(See also 1 SMITH'S LEADING CASES notes to *Lampleigh v. Braithwait* (9), 13th Edn., p. 155, *et seq.*) Now it is said in the present case, and said truly, that until the petitioning creditor had paid the bank, no debt became due to her from the debtor. But this is beside the point. The implied undertaking to indemnify is an undertaking to re-imburse the guarantor upon the happening of a contingency, viz., payment by the guarantor to the creditor, and until that contingency happens, there is no debt. But the question here is :

When was the contract entered into, or the debt or obligation incurred, in respect of which the judgment was obtained ?

The only answer to this question (apart from the actual debt), in my opinion is, when the implied undertaking to indemnify was given, and this was at the date of the request. To quote again the words of POLLOCK, C.B., in speaking of the general rule, in *Brittain v. Lloyd* (8), at p. 773 :

The request to pay, and the payment according to it, constitute the debt.

In the case where the request is to enter into an obligation, the request to pay is implied from the fact of entering into the obligation. This appears from the passage already cited from *Batard v. Hawes* (6), a case which brings out the point in a particularly neat manner. Twelve gentlemen, including the plaintiff, became co-guarantors. The plaintiff had been compelled to pay the whole debt and he sued the defendant, one of the other eleven, for contribution. Two of the co-guarantors died before the payment by the plaintiff. The question which arose for decision was whether the defendant was liable to contribute 1/12th or

1/10th of the amount which the plaintiff had paid. It was held that the liability was to contribute 1/12th only. LORD CAMPBELL, C.J., puts the point at p. 296 :

A If the right to contribution is to be considered as arising merely from the fact of payment being made, so as to relieve a party jointly liable from legal liability, we should have to look to the number of co-contractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied engagement of each, to pay his share, arising out of the joint contract when entered into.

B Then follows the passage which I have already quoted, and LORD CAMPBELL, C.J., proceeds :

C In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each co-contractor ought to pay as between themselves ; and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor ; and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement.

D The rule as to the right of contribution among co-sureties laid down in this case which was a case at law, is, of course, no longer to be followed for the reason that equitable principles are now applicable in all courts, and these are based in this matter of contribution, not on the terms of the contract implied between the co-sureties, but upon equitable considerations. But the case is, in my opinion, still an authority for the
E proposition that where an obligation is entered into on request, the ultimate payment made in pursuance of that obligation is to be referred to the original request and the rights of the parties determined accordingly. The position of co-sureties *inter se* and the position of a
F single surety giving a guarantee at the request of the principal debtor, are treated in the case as being the same from the point of view of the contractual obligations to be implied from the entry into the obligation.

I should myself have thought that once the contractual basis of the relationship is appreciated, the question raised in this appeal would only admit of one answer. But I have thought it right to refer to the
G authorities above cited in view of an argument of this nature which was addressed to us. It was said that the claim in the action was a claim for money paid and that it was competent for the petitioning creditor to frame her claim in this way without reference to any implied obligation to indemnify. It is true that in the old form of pleading an
H action of *indebitatus assumpsit* was a proper form of action in such a case, and it was with actions of this nature that the two cases to which I have referred were concerned. But it was of the essence of the claim that the payment was made on request : see 1 SMITH'S LEADING CASES, 13th Edn., at p. 155. Now where, as in the present case, the implied

request for payment is referable to a request to give a guarantee, the contractual basis of the action is apparent, and the difference between the old form of action of *indebitatus assumpsit* and an action on a special contract to indemnify disappears for all practical purposes. The question whether or not the subsection applies cannot, in my opinion, be affected A by the fact that it would have been open to the plaintiff to bring his action on an *indebitatus assumpsit* instead of declaring on the implied undertaking to indemnify (compare *Crampton v. Walker* (10) and *Hamilton v. Gould* (11)). A question may arise as to the application of the subsection in a case where a guarantee is given without any antecedent B request on the part of the debtor. That case is merely one example of a number of cases where the law raises an obligation to indemnify irrespective of any actual antecedent contractual relationship between the parties. A quite recent example of a case where the law raises such an obligation irrespective of antecedent contract is to be found in a C case decided in this court of *Brooks Wharf and Bull Wharf, Ltd. v. Goodman Brothers* (12). Where a guarantee of a married woman's debt is given before the Act without any request from her, and the payment which gives rise to the obligation to indemnify is made after the Act, it might be argued that the obligation was not incurred before the passing D of the Act. But that is not this case, and I express no opinion upon it. In this case, the guarantee having been given at the request of the debtor, I am clear that the judgment was one in respect of a contract entered into and an obligation incurred before the passing of the Act, and I agree that the appeal should be dismissed with costs. E

Solicitors: *W. P. Davies & Son* (for the creditor); *A. E. Sutton* (for the debtor).

[Reported by DEREK H. KITCHIN, Esq., Barrister-at-Law.]

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TOWNLEY MILL COMPANY (1919), LTD. (In Voluntary Liquidation) v. OLDHAM ASSESSMENT COMMITTEE.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Russell of Killowen and Lord Maugham), **November 17, 19, 20, 23, 24, December 17, 1936.**]

Rates and Rating—Basis of assessment—Cotton mill—Production discontinued—Occupation only for preservation of process machinery and plant—Beneficial occupation—Rating and Valuation Act, 1925 (c. 90), s. 24.

The appellants, who were owners of a cotton mill, ceased production, but continued to occupy the mill for the sole purpose of the preservation of the process machinery and plant :—

HELD : the Rating and Valuation Act, 1925, s. 24, applied and had the effect of forbidding a valuation of the hereditament on the footing that it was being used for the purpose of housing the process plant and machinery.

Per LORD MAUGHAM : If certain machinery is treated as of no value for the purpose of rating, it cannot serve to inflate the rateable value even on the warehousing basis.

[EDITORIAL NOTE.] This case is concerned with the assessment for rating purposes of a silent mill, though, of course, the decision is generally applicable to all works and factories which are standing idle when the assessment has to be made. It is decided that such a case is governed by the Rating and Valuation Act, 1925, s. 24, and the assessment will, in most cases, be a purely nominal one ; but the House does not definitely overrule the decisions in *Staley v. Castleton Overseers* (1) ; *Harter v. Salford Overseers* (2) ; and *Borwick v. Southwark Corpn.* (4). The House also refused to state that the practice of treating the owner of an empty house as not being rateable is an exception from the general law of rating. It will be noted that a distinction is made between process machinery and motive or power machinery. The latter must be considered to be a part of the hereditament to be valued. It is the process machinery whose value, in the case of an idle mill, is to be ignored.

AS TO RATING OF MACHINERY AND PLANT, see HALSBURY, 1st Edn., Vol. 24, Rates and Rating, pp. 28, 29, para. 48 ; AND FOR CASES, see DIGEST, Vol 38, pp. 524, 525, Nos. 720-727. FOR THE RATING AND VALUATION ACT, 1925, s. 24, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 650-652.]

Cases referred to :

- (1) *Staley v. Castleton Overseers* (1864), 5 B. & S. 505 ; 38 Digest 525, 725.
- (2) *Harter v. Salford Overseers* (1865), 6 B. & S. 591 ; 38 Digest 525, 726.
- (3) *Kirby v. Hunslet Assessment Committee*, [1906] A.C. 43 ; 38 Digest 533, 785.
- (4) *Borwick v. Southwark Corpn.*, [1909] 1 K.B. 78 ; 38 Digest 426, 16.
- (5) *Liverpool Corpn. v. Chorley Union Assessment Committee*, [1913] A.C. 197 ; 38 Digest 428, 36.

APPEAL from an order of the Court of Appeal (GREER, SLESSER and SCOTT, L.JJ.), reversing an order of a Divisional Court of the King's Bench Division by which an appeal by the appellants by case stated from an order of the Lancaster Court of Quarter Sessions was allowed, and the rateable value of the appellants' premises was reduced to £7.

W. E. Tyldesley Jones, K.C., and *Robert W. Leach* for the appellants.

Walter Monckton, K.C., A. M. Trustram Eve, K.C., and F. B. Turner for the respondents.

Tyldesley Jones, K.C.: It is not open to the respondents to value a mill as a warehouse for the plant and machinery it contains. It is of no benefit to the appellants as owners of the building, plant and machinery that the plant and machinery remained on the premises and were preserved from depreciation. There is no beneficial occupation of the hereditament as a cotton mill, and if there is beneficial occupation it is so limited as to be almost negligible. [Counsel referred to *Liverpool Corp'n. v. Chorley Union Assessment Committee* (5).]

Monckton, K.C.: An owner who retains property in hand and gets a benefit is in occupation and is rateable to the extent of that benefit. There is sufficient occupation if in fact the owner's conduct is such as to deny occupation to another. It is a question of intention to retain exclusive occupation for a purpose. Is he getting the use that he desires to get from his property? It is unnecessary to prove actual use if there is something which amounts to occupation. There is legal occupation if there is an intention to exclude others, in which case the owner can be rated. Here there is beneficial occupation, as there is considerable value in the mill being used for the purpose of preserving its contents, although there is no value in it as a cotton mill. The effect of sect. 24 of the Act of 1925 is that the rateable value is to be fixed by taking into account not the value of the machinery, but the value to the hypothetical tenant of having his machinery and plant preserved in the mill. [Counsel referred to *Staley v. Castleton Overseers* (1), *Harter v. Salford Overseers* (2), *Kirby v. Hunslet Assessment Committee* (3), *Borwick v. Southwark Corp'n.* (4).]

Trustram Eve, K.C., followed on the same side.

LORD BLANESBURGH: My Lords, I have had the advantage of reading the opinion which is about to be pronounced by my noble and learned friend, LORD RUSSELL OF KILLOWEN. I agree entirely with it and with the motions with which it concludes.

LORD RUSSELL OF KILLOWEN: My Lords, the question here in debate is the measure of the rateability of the owners of premises (formerly, but no longer, carried on as a cotton-spinning mill), in respect of their alleged occupation thereof. The arguments on both sides fall into two divisions; the first consisting of arguments as to the law which should govern the matter irrespective of the provisions of the Rating and Valuation Act, 1925, s. 24. These involve a consideration of the extent of the ground covered by certain old decisions such as *Staley v. Castleton Overseers* (1) and *Harter v. Salford Overseers* (2), under which people have been rated in respect of their occupation of

silent factories for the purpose of housing machinery therein, and also the correctness of those decisions. The second division consists of arguments as to whether the before-mentioned section applies to the present case and operates to render unnecessary the consideration of the earlier decisions. The section finds its place in a long Act which embraces within its provisions the law as to rating and valuation which is to prevail when and where the Act applies. The relevant provision of sect. 24 is subsect. (1), which runs thus :

For the purpose of the making or revision of valuation lists under this part of this Act, the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein :—

(a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in the third schedule to this Act shall be deemed to be a part of the hereditament :

(b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament.

The third schedule is in the following terms :

CLASSES OF MACHINERY AND PLANT TO BE DEEMED TO BE PART
OF THE HEREDITAMENT.

1. Machinery and plant (together with the shafting, pipes, cables, wires, and other appliances and structures accessory thereto) which is used or intended to be used, mainly or exclusively in connection with any of the following purposes, that is to say :—

(a) the generation, storage, primary transformation or main transmission of power in or on the hereditament ; or

(b) the heating, cooling, ventilating, lighting, draining, or supplying of water to the land or buildings of which the hereditament consists, or the protecting of the hereditament from fire :

Provided that, in the case of machinery or plant which is in or on the hereditament for the purpose of manufacturing operations or trade processes, the fact that it is used in connection with those operations or processes for the purpose of heating, cooling, ventilating, lighting, supplying water, or protecting from fire shall not cause it to be treated as falling within the classes of machinery or plant specified in this schedule.

2. Lifts and elevators mainly or usually used for passengers.

3. Railway and tramway lines and tracks.

4. Such part of any plant or any combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure.

The plant and machinery referred to in sect. 24 (1) (a) are plant and machinery whose function is, not to execute any manufacturing operation or trade process, but to generate and transmit power to, or to warm, or cool, or ventilate, or light, etc., the hereditaments in question. They may be conveniently called “motive plant and machinery,” while the manufacturing or trade process plant and machinery may be conveniently referred to as “process plant and machinery.”

In the present case the condition of this silent cotton mill as regards its contents was on Apr. 1, 1933 (the relevant date) as follows : The whole floor space of the mill was 23,408 square yards, of which 2,409

square yards were occupied by the motive plant and machinery. A further 2,105 square yards were let off and were in separate rateable occupation. We are not concerned with that part of the mill. The remaining floor space, viz., 18,894 square yards, was fully occupied by process plant and machinery and certain accessories thereto. As A to the accessories, both parties agree that these are part of the process plant and machinery and are not separately in issue. In addition, the mill contained some chattels of little value. The parties have agreed that in so far as the hereditament is being occupied for the purpose of housing those loose chattels, the appellants shall be rated in respect B of that occupation upon the footing of a £7 rateable value. I might add, though the fact is irrelevant to the question of the statute, that the process plant and machinery is nearly all physically fixed to the hereditament, and so far as not so fixed it consists of machines fixed by their own weights which vary from 21 cwt. to 115 cwt. The assess- C ment committee fixed the net annual value of the property for rating purposes at £1,437, which they declined to alter except to the extent of treating the portion which had been let off as a separate hereditament and assessing it accordingly. The appellants appealed to quarter sessions. The committee of justices appointed for that purpose heard D the appeal, and held that there was no beneficial occupation of the hereditament as a cotton mill, but they held that the appellants

were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery accessories thereto and loose chattels.

Quarter sessions thereupon dismissed the appeal with costs, but stated E a case for the opinion of the High Court. By an order of the King's Bench Division dated June 20, 1935, it was ordered that the order of quarter sessions

be set aside and judgment entered for the appellants at quarter sessions that the rateable value of the premises of the appellants be assessed at the agreed sum of F £7 with costs.

The judgment of the divisional court was based solely upon the interpretation of sect. 24 of the Act of 1925. LORD HEWART, L.C.J. (with whom HAWKE and LAWRENCE, JJ., agreed), thought that on the construction of sect. 24 the matter was plain, and that on its clear G language the object of the section was to get rid of the old doctrine that although machinery not forming part of a hereditament could not be rated, nevertheless the rateable value of a hereditament was to be enhanced by reference to the machinery which was in it, and which made it appropriate to the particular industry carried on therein. Under H the section motive plant and machinery is to be deemed part of the hereditament which is being valued; as to process plant and machinery, no account is to be taken of its value with respect to the valuation of the hereditament. My Lords, I agree with the opinion of LORD HEWART,

L.C.J. It was said that the section only referred to the *value* of the process plant and machinery, and did not forbid the taking into account of its existence and presence in the hereditament ; and that accordingly the section in no way interfered with the application of the old authorities, with the result that the appellants could be rated in respect of their occupation of the hereditament for the purpose of housing the process plant and machinery. This contention is too subtle for me ; for I am unable to see how the value of the occupation for this purpose to a hypothetical tenant can be assessed without some consideration of the value of the plant and machinery housed. Indeed, that this is so appears from the case stated, in which occurs this passage :

The capital value of the loose chattels on the premises was very small and the rent which a hypothetical tenant would pay to store them would be insignificant.

I would paraphrase sect. 24 (1) in its application to the present case thus : with respect to the valuation of the appellants' hereditament, no account shall be taken of the value of any plant or machinery in or on the hereditament, except that all motive plant and machinery in or on the hereditament shall be deemed to be a part of the hereditament. In my opinion, assuming that the section applies to the present case, the decision of the King's Bench Division was right. The case was there decided upon the footing that the section did apply. Indeed no one suggested the contrary view. In the Court of Appeal the suggestion seems to have been made for the first time *per curiam* that the section did not apply to the case of a silent mill. In the result, that view prevailed, the appeal being allowed and the order of sessions being restored. GREER, L.J., stated that unless the Act of 1925 had made a difference, it was clear on the authorities that the present appellants were in rateable occupation of the mill, and that :

Quarter sessions were entitled to take into account that they were in beneficial occupation in respect of the preservation of the process machinery pending either the sale or lease of the property or the removal for sale of the process machinery.

He then considered the effect of the Act of 1925. He does not hold that the section does not apply, but he remarks as to its construction :

I am satisfied that the intention of the section was not in any way to effect any alteration in the law as laid down in *Staley v. Castleton Overseers* (1) and *Harter v. Salford Overseers* (2).

As to this, my Lords, I can only say that the intention of an Act of Parliament must appear from the language used therein, and I can find nothing in the context here to justify the conclusion reached by GREER, L.J. SLESSER, L.J., held that apart from the Act of 1925 the hereditament, regarded as a warehouse, would have been rateable as such. Proceeding to consider sect. 24, he said that it makes a clear dichotomy between motive machinery and process machinery, a dis-

tion which he says (for some unexplained reason) is appropriate to machinery in use. He then proceeds to inquire, as he expresses it :

whether the language used is such that this division into motive and process machinery . . . has in fact been made to apply by compulsion of language to the case of machinery permanently out of commission.

He holds that the language used has no such effect ; and as I read his judgment the only specific language in the enactment upon which his view is based consists of the following expressions which are to be found in the third schedule, viz., " which is used or intended to be used," " the fact that it is used " and " mainly or usually used." SLESSER, L.J., it seems to me, errs in two regards. There is no dichotomy or division into motive machinery and process machinery, nor does the section deal with factories alone. It applies to all hereditaments (with one excepted class only), and it provides with respect to the valuation of every hereditament to which it applies, that no account shall be taken of the value of any plant or machinery therein or thereon, subject however to the provision that " motive plant and machinery " (which, be it observed, may be found in a private house) shall be deemed to be a part of the hereditament. Further, the expressions as to user contained in the third schedule do not in my opinion justify the view that the words " any hereditament " do not include a hereditament which is a silent mill. The third schedule is concerned solely with *classes* of machinery ; and surely it cannot be right to say that a cotton-spinning machine in motion, and a cotton spinning machine at rest, belong to different *classes* of machinery. On the other hand, the expressions as to user (actual or intended), indicating the sole user, or the normal or principal user of machines, contain true *indicia* of classes, and are framed in the present tense, without necessarily postulating that the machinery should in fact be in operation.

SCOTT, L.J., also held that sect. 24 had no application to the case. He treats the section as if it were confined to factories. He says :

The fact that the building was once a working factory, and may still in popular language be called " a cotton mill," is not enough to bring it within the section.

And relying on what he conceives to have been the intention of the legislature, viz., to remedy a grievance felt by manufacturers as a result of the decision of your Lordships' House 19 years before in the *Hunslet* case (3), and relying also upon the words as to user which occur in the third schedule to the Act of 1925, he reaches the conclusion that sect. 24 cannot apply. Here again the fact seems not to be appreciated that the section is not directed to factories only, but is a general section applicable in terms to the valuation of every hereditament which is not valued on what is commonly known as the profits basis. It cannot be a question whether a silent factory, though a factory, can be " brought " within

the section. It is a hereditament which does not fall to be valued on the profits basis, and is therefore necessarily within the section.

For myself, I can see no escape from the plain language of the section. It applies to the present case, and operates to forbid a valuation of the hereditament on the footing of its being used for the purpose of housing the process plant and machinery. Indeed if the section does not apply, I cannot see why in this case an additional value was not placed upon the hereditament, by reason of its being used for the purpose of housing the motive plant and machinery as well. Since the section applies and operates as indicated above, it becomes unnecessary to express any final view upon the arguments comprised in what I have called the first division of the arguments. I desire, however, to keep open the questions (i) whether *Staley v. Castleton Overseers* (1) and *Harter v. Salford Overseers* (2) were correctly decided except in regard to loose chattels: (ii) whether *Borwick v. Southwark Corporation* (4) was correctly decided: and (iii) whether the practice of treating the owner of an empty house as not being rateable, is, in truth, an exception from the general law of rating.

In my opinion this appeal should succeed, the order of the King's Bench Division should be restored, and the appellants should have their costs throughout; and I move your Lordships accordingly.

LORD MAUGHAM (read by LORD ALNESS): My Lords, in this appeal there has been a somewhat remarkable difference of judicial opinion. The question involved is as to the measure of rateability of the appellants as the owners of premises, till recently carried on as a cotton-spinning mill, for the rating year beginning on Apr. 1, 1933. Before that date the appellants appeared in the valuation list of the rating area of Middleton as in rateable occupation of the premises as a cotton mill and industrial hereditament with a net annual value of £1,437 and a rateable value of £359. In the month of Sept., 1931, the appellants closed down the mill. In Aug., 1932, they sold the mill stores and shortly afterwards they stripped the rovings from the bobbins for sale to a waste dealer. In Feb., 1933, they ceased to occupy the offices of the premises for any purpose; on Apr. 1, 1933, the only person employed on the premises was the engineer who was employed to look after the machinery at a salary of £2 12s. 6d. per week as against his previous salary of £6. It is therefore not surprising that a proposal was made to the respondents for an amendment of the valuation list. This was acceded to in so far as the appellants sought to obtain a valuation as a separate hereditament of the basement of the premises which had been let off and was in the occupation of the Yorkshire Dyeing and Proofing Co., Ltd.; but was wholly refused as regards a proposal that the valuation of the remaining premises should be reduced to nil. The appellants appealed to quarter

sessions, but the Quarter Sessions Rating Appeal Committee dismissed the appeal, the committee of justices being of opinion that :

the appellants were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery accessories thereto and loose chattels.

The appellants on a case stated appealed to the High Court and a divisional court consisting of LORD HEWART, L.C.J., and HAWKE and LAWRENCE, JJ., allowed the appeal, holding that the amount of the assessment should be reduced to the figure of £7, being a figure agreed between the parties for the purposes of the appeal as the rent which a hypothetical tenant would pay for the storage of certain loose chattels which remained upon the premises. The respondents then appealed by leave to the Court of Appeal, and that court, consisting of GREER, SLESSER, and SCOTT, L.JJ., allowed the appeal, holding that quarter sessions had come to a correct determination and decision in point of law. Hence, with leave given by the Court of Appeal, the present appeal.

The facts as found by the justices in the case stated are comparatively simple. In addition to the facts above stated, the following findings are material :

(i) The floor space occupied by the process plant and machinery would have been suitable and available if it had not been occupied by process plant and machinery for warehousing or other purposes, but in some cases adaptation or alteration of the premises would have been necessary but not to any substantial extent.

(ii) The hereditament was occupied by the appellants to some extent for the purpose of keeping the plant and machinery in repair and good condition.

(iii) It was of benefit to the appellants, as owners of the building, plant and machinery, that the plant and machinery should remain on the premises and be preserved from depreciation.

(iv) The capital value of the loose chattels was very small and the rent which a hypothetical tenant would pay to store them was insignificant. [It was subsequently agreed to be £7.]

(v) Save as aforesaid there was no user of the hereditament.

(vi) There was no beneficial occupation of the hereditament as a cotton mill.

The justices, as above stated, were of opinion and held that the appellants were in beneficial occupation of the hereditament by reason of the warehousing therein of the process plant and machinery, accessories thereto, and loose chattels, and they on that ground dismissed the appeal.

My Lords, two main questions arise on this appeal. First, it is contended that by virtue of the Rating and Valuation Act, 1925, s. 24 (1), all the plant or machinery in or on the hereditament which does not belong to any of the classes specified in the third schedule to the Act (now replaced by a schedule contained in the Plant and Machinery (Valuation for Rating) Order, 1927) must be disregarded in making a valuation for rating purposes. Secondly, it is contended that if this view is unsound the valuation still cannot stand, since, apart from a few loose chattels, practically all the plant and machinery on the

premises were fixtures and accordingly formed part of the hereditament, and it was urged, with at least plausibility, that the hypothetical tenant could not be imagined as paying a rent for storing or warehousing part of the hereditament itself. My Lords, in the divisional court the first
A contention was successful, and it became unnecessary to consider the second. In the Court of Appeal both contentions failed. After very careful consideration of the judgments in the two courts I feel constrained, with the greatest respect for the opinions of those from whose views I differ, to agree with the opinion expressed by LORD HEWART,
B L.C.J., in the divisional court and concurred in by HAWKE and LAWRENCE, JJ. Out of respect for the Court of Appeal I shall endeavour shortly to express the reasons for my conclusion.

My Lords, it will be useful first to consider the position of the hereditament in question from the point of view of rating as it was before the
C Act of 1925. There is no doubt that in order to prove rateable occupation it was necessary to establish not only occupation, but that the occupation was a thing of value (*Liverpool Corpn. v. Chorley Union Assessment Committee* (5)). It was equally clear that if liability to the
D rate was established, the basis of assessment (in general) was that prescribed by the Parochial Assessments Act, 1836, that is, the "rateable value" was the sum estimated to represent the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe
E rentcharge, if any, and to bear the cost of repairs and insurance and other expenses, if any, necessary to maintain the hereditament in a state to command that rent. "The gross estimated rental" was estimated in the same way, but without the deduction for repairs, insurance, or expenses necessary for maintenance. There was thus a hypothetical tenant and a hypothetical rent, but I think a real and concrete heredita-
F ment. It was necessary to take into consideration all possible tenants, including the actual occupier and even the owner. The hypothetical tenant was assumed to be a tenant from year to year with a reasonable prospect of continuing in occupation; but the hypothetical rent which the tenant could give was estimated with reference to the hereditament
G in its actual physical condition (*rebus sic stantibus*), and a continuance of the existing state of things was *prima facie* to be presumed. In my opinion it is possible to make very wide assumptions as to the hypothetical tenant if these propositions are borne in mind; but it is not legitimate to fix a rateable value for a hereditament at a figure in excess
H of a nominal amount unless it can be shown that the hypothetical tenant might fairly be expected to pay a larger rent. There were some special considerations which were long ago established in relation to hereditaments, such as factories, equipped with machinery and plant. It was held that machinery and plant, in use for the purpose of the factory,

whether or not affixed to the freehold, or whether or not to be regarded as landlord's fixtures or tenant's fixtures, were to be taken into consideration in assessing the rateable value, on the assumption that the hypothetical tenant would pay a rent based on the premises in their actual state of equipment. These authorities were considered in this House in the case of *Kirby v. Hunslet Assessment Committee* (3), and the House considered that it was bound to follow the long line of decisions in favour of this proposition. LORD MACNAGHTEN quoted with approval an observation made by LORD CAMPBELL that it was of the greatest importance that a rule upon such a subject, which had been laid down and acted upon, should be adhered to. That rule applied to mills and factories as going concerns, but there was another doctrine as regards mills, factories and other like buildings with plant and machinery in them which for some reason were not working or operative concerns. This rule was laid down in relation to mills which had ceased to work owing to the impossibility of procuring cotton from the southern states of America during the American civil war. The two cases are *Staley v. Castleton Overseers* (1) and *Harter v. Salford Overseers* (2). In the first case it was held that the owners were rateable as regards the mill as if it were a warehouse for storing the machinery and plant actually in the mill. Mr. Tyldesley Jones argued that that case did not decide that the plant and machinery which were fixed to the hereditament and consequently formed a part of it could be regarded as stored by the hypothetical tenant. A comparison of the various reports of the case certainly tends to throw doubt on the scope of the decision. On the other hand, the case of *Harter v. Salford Overseers* (2), decided in the following year, was treated by the learned judges of the King's Bench as indistinguishable from the former case; and I am of opinion that the decision in the latter case necessarily involves the proposition that it was correct to treat the building as let to the hypothetical tenant as a warehouse not only for the loose chattels but also for the plant and machinery necessary for the working of the mill. I think the plant and machinery so deemed to be stored included tenant's fixtures, or fixtures usually so described, removable during the term of the lease. The report is not clear on the question whether landlord's fixtures ought also to be taken into account. It should be added that the assumption is not that the hereditament is being let from year to year to a tenant carrying on the business of warehousing the goods of others for reward. A continuance of the existing state of things is assumed. The hypothetical tenant is supposed to be paying a rent for the right to store merely the plant and machinery which are actually on the premises, and they, it would seem, are assumed for this purpose to belong to him.

It is not evident that fixed machinery and plant of the nature of landlord's fixtures could properly be regarded as being stored by the

hypothetical tenant; nor is it easy to see what distinction could be drawn between landlord's fixtures and tenant's fixtures from the point of view of the rateability of the occupier in respect of the hereditament, if we hold to the doctrine that the valuation must proceed on the actual physical state of premises at the time, so that we ought not to suppose an imaginary severance of fixtures from the hereditament. We were accordingly invited to be strictly logical, and to reverse these long-established decisions so far as they related to fixtures if we were unable to explain, and *a fortiori* if we were unable to understand them. For the reason already indicated I should hesitate a long time before acceding to this invitation.

My Lords, it was doubtless with an accurate knowledge of the state of the law in regard to plant or machinery in or on a building as affecting its rateable value that sect. 24 was inserted in the Rating and Valuation Act, 1925. I need not repeat the section in full. Treating the plant or machinery belonging to any of the classes specified in the third schedule (or in the substituted schedule) as being sufficiently described as "power machinery," and all other plant and machinery in or on the hereditament as being "process machinery" (I use the terms only for brevity), the section in effect provides "with respect to the valuation of any hereditament" (with an exception which I shall notice later), (a) that power machinery (and I add whether loose or fixed) is to be "deemed to be a part of the hereditament," and (b) "subject as aforesaid, no account shall be taken of the value of" any process machinery (and again I add whether loose or fixed). The question on which opinions have so widely differed is simply this: does the section apply only to the case where the hereditament contains what may conveniently be called active machinery, that is, does it merely alter the law laid down in the numerous cases which were finally approved by this House in the *Hunslet* case (3), or does it also apply to the case where the hereditament containing machinery not in use is being rated on what may be called the warehouse principle, that is, does it also affect the quantum of valuation as laid down in *Staley v. Castleton Overseers* (1) and *Harter v. Salford Overseers* (2)?

My Lords, I must observe in the first place that no problem arises here as to rateable occupation. It is admitted that the appellants are occupiers and that, to the extent of the loose chattels, there is a beneficial occupation. The dispute is merely as to the quantum of rateable value. That, however, is the precise subject matter of sect. 24, and *prima facie* it seems to me that the language of the section covers the case of valuation on the warehouse basis. The section applies to any hereditament with a single exception, that of a hereditament which is being valued for rating on a profits basis. What sufficient reason is there for implying another exception, which might have been very simply expressed? It

is not immaterial to note that the section is to be found in a lengthy statute which is designed in many respects to amend and simplify the law as to the making and collection of rates. Part II of the Act is devoted to the subject of valuation. Sect. 22 contains elaborate provisions for the ascertainment of rateable value. Sect. 23 provides for the assessment of buildings occupied in parts. Both these sections are of general application. Then comes sect. 24 as to the valuation of any hereditament which happens to contain any plant or machinery. It is not confined to mills and factories, and it seems to me, therefore, to do considerably more than merely to alter the law as approved in the *Hunslet* case (3). It was suggested that the words "no account shall be taken of the value, etc." do not mean "no account shall be taken of the *presence*, etc."; but, after all, the section is only dealing with values of machinery and plant for the purpose of fixing the rateable value of the hereditament under sect. 22 (1) (c) of the Act. It may be added that the "gross value" is to be ascertained according to a definition contained in sect. 65 which repeats the definition contained in the Parochial Assessments Act, 1836 (the whole of which is now repealed). If certain machinery is treated as of no value for the purpose of rating, it cannot in my view serve to inflate the rateable value even on the warehousing basis. Moreover, in the place where it is found I think we ought naturally to conclude that sect. 24 is intended, subject only to the express exception, to form a code for the valuation of any hereditament containing any plant or machinery whether it is or is not in actual use.

My Lords, for these reasons, including those given by LORD HEWART, L.C.J., I am of opinion that the appeal at quarter sessions should have been allowed and that the figure in the assessment should have been reduced to the agreed figure of £7. I therefore concur in the proposed resolution.

Appeal allowed with costs. Order of King's Bench Division restored.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester and Blackburn (for the appellants); *Gibson & Weldon*, agents for *Megson & Nicholson*, Oldham (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

OPPENHEIMER v. LOUIS ROSENTHAL & CO., A.G.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), November 10, December 7, 8, 17, 1936.]

Practice—Writ—Service out of the jurisdiction—Breach of contract committed within the jurisdiction—R.S.C., Ord. 11, r. 1 (e).

The plaintiff, a German national of Jewish faith, was manager of the London branch of a German company. The company, not knowing the plaintiff's London address, sent from Germany to their agents in London a blank piece of notepaper containing their address and signature, and instructed their agents to write thereon a letter dismissing the plaintiff from their employment and to post it in London to his address. The plaintiff commenced an action for wrongful dismissal, and obtained leave to serve the writ out of the jurisdiction of the court. The company applied to have the service of the writ set aside on the grounds that the alleged breach of contract took place in Germany, and that as both parties were of German nationality, and as the contract of employment was to be construed according to German law, Germany was the *forum conveniens*. The plaintiff contended that, being of the Jewish faith, he might not be entitled to the services of an advocate in the German court, and moreover, should he return to Germany to prosecute a lawsuit, he would be in grave peril of being deprived of his liberty. The application to set the writ aside was granted. The plaintiff appealed to the Court of Appeal:—

HELD: (i) the alleged breach of contract was committed in London.
(ii) England was the *forum conveniens*.

[EDITORIAL NOTE. This case is of interest both from the fact that a blank letter was sent to England from abroad to be filled in here in such a way as to make it a dismissal by a company of a servant resident here; and also in the consideration by the Court of Appeal of the position arising from the possible refusal by foreign courts to allow a party to be represented by an advocate. There is also the fact that the plaintiff if he returned to Germany was said to be likely to have his liberty restricted. It was held that this was a case in which it was proper to allow the plaintiff to proceed in the English courts.]

AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 117-120, para. 208; AND FOR CASES, see DIGEST, Practice, pp. 339, 340, Nos. 574-584, and pp. 346, 347, Nos. 623-629. See YEARLY SUPREME COURT PRACTICE, 1937, pp. 86-90, 99, 100.]

Cases referred to:

- (1) *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141; 11 Digest 477, 1310.
- (2) *Mutzenbecher v. La Aseguradora Espanola*, [1906] 1 K.B. 254; 12 Digest 317, 2624.
- (3) *Holland v. Bennett*, [1902] 1 K.B. 867; 34 Digest 100, 741.
- (4) *Martin v. Stout*, [1925] A.C. 359; Digest Supp.
- (5) *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; Digest Supp.
- (6) *The Hagen*, [1908] P. 189; Digest, Practice, 340, 579.
- (7) *Frost v. Knight* (1872), L.R. 7 Exch. 111; 12 Digest 340, 2841.
- (8) *Cherry v. Thompson* (1872), L.R. 7 Q.B. 573; Digest Supp.
- (9) *Re Schintz, Schintz v. Warr*, [1926] Ch. 710; Digest, Practice, 358, 716.
- (10) *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 69 L.J.Ch. 813; 12 Digest 340, 2840.

APPEAL from an order of TALBOT, J., dated Oct. 23, 1936.

In 1934 the plaintiff, a German national of the Jewish faith, made an agreement with the defendants, a company incorporated in Germany, to serve as the manager of an associated company in England. By a letter posted in London on Nov. 21, 1935, the defendants gave the plaintiff notice. The plaintiff brought an action for wrongful dismissal, and obtained leave from MACNAGHTEN, J., to serve the writ out of the jurisdiction of the court. Upon the application of the defendants TALBOT, J., made an order setting aside the writ and the service of the writ. A

The plaintiff appealed to the Court of Appeal. B

John Lawrence, for the appellant: In German law, 6 months' notice must be given to terminate at the end of a quarter; this was a wrong notice and a breach of the agreement. The respondents say that a letter cannot be a breach, and that any breach there was took place in Germany. It is submitted that as the letter was posted in London, the breach was within the jurisdiction. Owing to his political views, the plaintiff cannot return to Germany; if he cannot bring his action in England, he cannot bring it anywhere. [Counsel referred to *Holland v. Bennett* (3), and *Mutzenbecher v. La Aseguradora Espanola* (2).] C

H. C. Leon, for the respondents: This contract was made in Germany, and has to be construed according to German law; both parties are German nationals. The fact that no advocates are allowed in certain cases in Germany is not conclusive. This was a matter of discretion for the judge, and his decision should not be interfered with; the facts were before him and he acted judicially. It is submitted that this case is not within R.S.C., Ord. 11, r. 1 (e); the breach takes place where a party evinces the intention of breaking the contract: *Martin v. Stout* (4). This notice was sent from Berlin; that is where any breach there was took place. [Counsel referred to *Lazard Brothers & Co. v. Midland Bank, Ltd.* (5), *The Hagen* (6), *Frost v. Knight* (7), *Cherry v. Thompson* (8), *Re Schintz, Schintz v. Warr* (9), *Logan v. Bank of Scotland* (No. 2) (1), and *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (10).] D E F

GREER, L.J.: In this case we are asked by the appellant to set aside an order made by TALBOT, J., discharging an order for service out of jurisdiction. R.S.C., Ord. 11, r. 1 provides: G

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever—

(e) The action . . . is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction. H

In the present case there is a German contract made in Germany for the employment of the plaintiff in England. The two parties are a German

company and the plaintiff. It is a contract of employment concerned with the services of the plaintiff in London within the jurisdiction. The defendants in Germany desired to get rid of the plaintiff. They had not got his London address so they could not post the letter of dismissal from Berlin. They were therefore compelled to send a letter to their agent in London with instructions to fill it up and post it to the plaintiff announcing his dismissal. That was a breach, and in my judgment it was clearly committed in London. The actual breach of contract was by a letter posted in London. That is exactly within R.S.C., Ord. 11, r. 1 (2). How it can be contended that the dismissal took place in Germany, I find it impossible to understand. There are a number of cases—it is difficult to follow the logic of them—to the effect that posting a letter abroad, whether the letter is received or not, is a breach abroad. They have no application to this case. This is not a case of mere repudiation, but of actual breach by posting a letter in London. It is true that even where a case is within the letter of the rule, the judge is entitled to exercise his discretion and can consider the *forum conveniens*. It is said that Germany is the *forum conveniens* in this case, or that it would be in normal circumstances, as the contract is governed by German law and by that law the dismissal does not operate unless it gives 6 months' notice to terminate at the end of a quarter. This need occasion no difficulty as there is in London at present a large number of distinguished German lawyers, and so there will be no injustice to the defendant company by depriving them of the opportunity of proving German law. On the other side there is said to be grave reason to suppose that, if the plaintiff goes to Germany, he would not be allowed to be represented by an advocate. He would have to appear in person before the Labour Court and conduct his own case; he would also be under a real risk of being arrested and put in a concentration camp. I find that the German courts are not the *forum conveniens* notwithstanding the fact that the plaintiff and the defendant company are both German. I think the learned judge took a wrong view; this appeal must be allowed, and the order reversing the order for service out of the jurisdiction itself reversed.

G

SLESSER, L.J. : I am of the same opinion. The plaintiff is in effect unlikely to have in the foreign court the rights of advocacy which, according to English notions of justice, everyone ought to have. The evidence shows that it is doubtful whether the plaintiff would be able to be represented by an advocate. It would depend on obtaining the permission of the presiding judge. If he could not obtain this permission, he would have to be present personally. If so, there is an affidavit that he would run the risk of being confined, which risk would be especially grave if it were known that his purpose in returning to Germany was to

H

present a claim against a German company. That evidence is uncontroverted. The principle is set out in *Logan v. Bank of Scotland* (No. 2) (1) in general terms, at p. 150 :

The English courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the courts can properly exercise jurisdiction. A

and again :

The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent court. B

It is clear that the courts here are the *forum conveniens* in this case. I can only add that in my view the matter was decided in *Mutzenbecher v. La Aseguradora Espanola* (2), where it was said by COLLINS, M.R., C at p. 259 :

There can be no doubt that there was a breach of the contract within the jurisdiction.

And later on by SIR GORELL BARNES, P., at p. 261 :

The defendants have not done that which they agreed to do, because notice was given, by their authority, declaring the agreement of agency to be void from the date of the notice. That notice appears to have been addressed from the office of the defendants' solicitors in London, and to have been enclosed in a letter from them to the plaintiffs. D

The facts there were indistinguishable in principle from those in this case. Both cases were brought before this court, and the matter is one of principle, *forum conveniens* being a matter of principle not a matter of discretion. E

SCOTT, L.J. : I agree, and have nothing to add.

Solicitors : *Adler & Perowne* (for the appellant) ; *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the respondents). F

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

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THE ATTORNEY-GENERAL v. COHEN.

[COURT OF APPEAL (Slessor, Romer and Greene, L.J.J.), November 26, December 18, 1936.]

A *Revenue—Stamp duty—Conveyance on sale—Series of transactions—Finance (1909-10) Act, 1910 (c. 8), s. 73.*

At a sale by auction the defendants purchased six dwelling-houses in lots, the consideration in respect of four of the lots being in each case less than £500. Six separate contracts of sale were signed and six abstracts of title were delivered. In respect of the four lots, four separate conveyances were made :—

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HELD [ROMER, L.J., dissenting]: this was not a “series of transactions,” and a certificate of value was properly (*i.e.*, without intention to defraud) included in the four conveyances. In order that transactions shall form a “series” within the Finance (1909-10) Act, 1910, s. 73, there must be some interdependence between them, and the fact that they are related by time and place and are effected by the same parties are casual matters which do not of themselves constitute the transactions a “series.”

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Per SLESSOR, L.J.: The mischief to be considered was that persons in reality conveying for more than £500 should be able to evade their liability to double duty merely by breaking up that large transaction into a number of smaller transactions each of less than £500.

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Observations on the procedure adopted whereby the court was asked to adjudicate on a matter raised before it upon an assumption of fact which was not true, such assumption being based upon an agreement between the Crown and a subject by which the subject was to be treated as having committed a criminal offence of which he was admittedly not guilty.

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[EDITORIAL NOTE. We have now the views of the Court of Appeal on this question of stamp duty and, although there is a dissenting judgment, it is understood that the case will not go to the House of Lords. The decision would be of more help to conveyancers if it stated some simple rule upon which the inclusion of a certificate of value could be determined. Unfortunately the two rules that emerge from the judgments are such that their application in any particular case must be largely a matter of opinion. The first of these rules would appear to be that the parties to the conveyance can subscribe the usual certificate of value without intent to defraud. The second is that there must be an integral interdependence between the transactions. Possibly the sentence from the judgment of SLESSOR, L.J., given in the headnote will be found to be the most useful guide.

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FOR STAMP DUTY ON CONVEYANCES, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, pp. 444-451, paras. 804-819; and FOR CASES, see DIGEST, Vol. 39, pp. 278-285, Nos. 621-671. FOR THE FINANCE (1909-10) ACT, 1910, s. 73, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 16, p. 754.]

Cases referred to :

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- (1) *Emmerson v. Heelis* (1809), 2 Taunt. 38; 39 Digest 260, 435.
- (2) *Holliday v. Lockwood*, [1917] 2 Ch. 47; 40 Digest 257, 2233.
- (3) *Farmer v. Cotton's Trustees*, [1915] A.C. 922;
- (4) *Kimbers & Co. v. Inland Revenue Comrs.* (1935), 51 T.L.R. 421; Digest Supp.
- (5) *M'Innes v. Inland Revenue*, [1934] S.C. 424; Digest Supp.

APPEAL from a judgment of LAWRENCE, J., delivered on Mar. 17,

1936, and reported in [1936] 1 All E.R. 583, in favour of the defendants on a case stated under R.S.C., Ord. 34, r. 1, and Ord. 68, r. 27.

Certain dwelling-houses were offered by one advertisement for sale by public auction in separate lots. They were sold on the same day, in the same manner and under the same conditions. The defendants made separate bids for six of the lots, all owned by the same vendor, and each of the six was sold separately to them. There were six contracts of sale, in the same form, and six separate abstracts of title were supplied. Four of the lots were sold for less than £500. The conveyances on sale of these four lots contained the usual certificates that they did not form part of a larger transaction or series of transactions the consideration for which exceeded £500. The liability of these conveyances to stamp duty being disputed, the parties concurred in stating for the opinion of the court the following question of law :

Whether each of the transactions effected by the four conveyances aforesaid formed part of a larger transaction or series of transactions in respect of which the amount or value of the aggregate amount or value of the consideration exceeds £500.

LAWRENCE, J., in his judgment ([1936] 1 All E.R. 583), held that there cannot be a series unless there be some interdependence between the separate transactions, and that whether there is interdependence depends upon the facts of each case. Here he found that there was no series of transactions. The fact that the parties to each conveyance were the same, the time was closely the same, and that the place was contiguous, was, he thought, a casual matter which did not constitute a series within the meaning of the section. He therefore gave judgment for the defendants, and the informant appealed.

The Attorney-General (Sir Donald Somervell, K.C.) and J. H. Stamp for the appellant.

Neville J. Laski, K.C., and Alter M. Hurwitz for the respondents.

The Attorney-General : Each of these transactions is one of a series, and the facts and circumstances were therefore not truly stated. No certificate should have been given, and the higher rate of duty should have been paid. The case where the transaction the subject of the conveyance is "part of a larger transaction" is covered before the words "a series of transactions" fall to be considered. These words must therefore include some transactions which are separate and independent in law. A succession of events may be a series from the point of view of one person concerned in them and not from that of others. Here the point of view must be that of the purchaser, the person who is liable to the penalty. The three conditions which, *prima facie*, constitute a series are : (i) There must be two or more sales or contracts of sale. This condition rules out the case of two transactions one of which is a sale of land and the other is a contract with the vendor to build a house, for it

has been held that the sale is not part of a larger transaction, because the contract to build is not a sale. (ii) The transactions must be between the same vendor and the same purchaser. This is a narrower submission than that made to the court below. (iii) The transactions must have been entered into before the completion of any one of the conveyances or transfers to the purchaser. The certificate can only relate to transactions which have been already entered into before the conveyance containing the certificate is executed.

A entered into before the completion of any one of the conveyances or transfers to the purchaser. The certificate can only relate to transactions which have been already entered into before the conveyance containing the certificate is executed.

B GREENE, L.J. : If two properties are bought at the same auction, and the title to property A is simple and the conveyance is soon prepared, but the vendor cannot give the certificate because the sale of property B is not complete, what is the position if the sale of B is never completed ?

C *The Attorney-General* : It may be that duty must be paid on conveyance A on the facts existing at the time of its execution, or there may be machinery for adjustment. An agreement is clearly a transaction within the meaning of the section. To form a series, the transactions must take place at about the same time. It is conceded that bids, if accepted, constitute separate contracts. [Counsel referred to *Holliday v. Lockwood* (2), *Kimbers & Co. v. Inland Revenue Comrs.* (4), and *M'Innes v. Inland Revenue* (5).]

D *Stamp*, following for the appellant : If a contract for sale is not completed, the conveyance will no longer form part of a series ; but if when one contract for sale is completed another is pending, then at that moment

E a series of transactions is on foot of which the conveyance forms part. The existence of a series depends upon the resemblance and the extent of the connection which must exist between the transactions, and upon the point of view from which they are regarded. The point of view is determined by the answer to the question : Is the purchaser substantially

F laying out something less than £500, or, by a series of transactions, laying out something more than £500 ? The events must be similar in character. There need be no conditional connection between the transactions ; they may be independent transactions, provided that they are sufficiently alike and connected to form in fact a series. The test for

G similarity is an objective one : the vendor must say that the purchaser, in contracting with him, has not entered into a series of transactions as between the two parties. The word "series" is not strictly capable of definition, but a series has certain characteristics, and they must be present in a sufficient degree in order that a number of facts may, from

H the relevant point of view, constitute a series.

Laski, K.C. : Sect. 73 doubles stamp duties subject to an exception in favour of separate transactions under £500. The form of words in the certificate is designed to prevent evasion by the splitting up of a large transaction or a series of transactions. The word "series" applies

to any succession of events which can be grouped together by means of a common element. An auction sale introduces peculiar factors: the buyer's volition is much modified by the actions of his competitors, and differently modified by them, in each separate sale. He becomes the owner of a particular lot by fortuitous circumstances. The mere fact that he has the fortune to become the owner of a number of lots which have a common vendor does not constitute a series of transactions, any more than if the lots were sold by different vendors. "Series" necessarily implies an interconnection like that joining the links of a chain. There must be a deliberate intention by the purchaser to fulfil the series of sales as a condition of doing business with the vendor at all. A series is a number of dealings by the same vendor with the same purchaser which are deliberately designed to be effected together and which would not be consummated by the purchaser if they were not effected together.

Hurwitz, following for the respondents: The section throws upon the parties the duty of giving a certificate, and therefore the court must consider, not the facts, but the intentions of the parties. Unless it can be shown that the parties, from first to last, intended to constitute a series of transactions, then the existence of what may be termed a series in common parlance is nothing to the point.

The Attorney-General, in reply: Motive is immaterial; the standard must be an objective one. The nature of the transactions and all the facts must be within the knowledge of both parties, but one party does not necessarily know the motives of the other.

SLESSER, L.J.: This case is, in form, a claim for penalty under the Stamp Act, 1891, s. 5, which provides that all the facts and circumstances affecting the liability of any instrument to duty with which any instrument is chargeable are to be fully and truly set forth in the instrument, and that every person who, with intent to defraud His Majesty, being employed in the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances, shall incur a penalty of £10. The liability is limited to cases where there is intent to defraud, but the proceedings in the present case, which are said to have been raised in order to obtain a decision of the court upon a question of law, do not rely upon any such guilty intention, and, indeed, it is upon the basis of the absence of *mens rea* that the parties have concurred in stating the question of law contained in the case.

In my view, this method employed for the elucidation of the problem to be considered is seriously to be deprecated. In a case where fraud is of the essence of the complaint, where therefore precision, in that personal reputation is involved, is peculiarly necessary, a fraudulent intention on the part of the subject, which alone would justify the infliction of the

penalty, has been assumed which is admitted by the Crown not to be present.

A On a strict interpretation of the statute, for absence of that fraud the case should in any event necessarily be answered in favour of the defendants. Yet it is provided that if the information be right, judgment shall be entered for the Crown for £9 without penalty, notwithstanding the fact that no intention to defraud is suggested. I find it difficult to understand on what principle in these circumstances liability could arise, and I think it entirely undesirable to attempt to produce B the results of penal action, albeit the penalty is to be waived, when in fact no more is sought than a bare declaration.

In the circumstances, however, having made my protest, I think it right, in order that the matter may finally be disposed of, to deal with the case as it was argued, though I am by no means saying that, had I C thought the Crown right in their contentions, I should not, nevertheless, for absence of fraudulent intention, have found in favour of the subject.

The material facts of the case are as follows: At a sale by auction, which had previously been advertised, certain dwelling-houses were offered for sale by the auctioneers in twelve separate lots belonging to D different vendors. The defendants made separate bids during the auction for certain of the premises comprised in six lots, two of which were sold for sums in excess of £500 and the four remaining lots were sold for less than £500 for each lot. Six separate contracts of sale were signed on behalf of the purchasers for each separate lot, and each was E separately stamped with adhesive stamps.

Nothing turns upon those lots which sold for sums in excess of £500, but as regards the remaining lots, four separate conveyances were duly executed and presented for stamping, and each of them contained a certificate in the following terms:

F It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500.

The question raised in the case must depend upon the proper construction of the Finance (1909-10) Act, 1910, which provides, by sect. 73:

G The stamp duties chargeable under the heading "Conveyance or Transfer on Sale of any Property" in the first schedule to the Stamp Act, 1891 (in this part of this Act referred to as the principal Act), shall be double those specified in that schedule: Provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by sect. 122 of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed £500 and the instrument contains a statement certifying that H the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500.

It is said by the Crown that the transaction of the purchase and conveyance of each of the lots under consideration which does not exceed

£500, though it is not part of a "larger transaction," forms part of a "series of transactions" within the language of the section in respect of which the amount or value of the consideration exceeds £500. The learned judge has come to the conclusion that, though the parties are the same, the times of transaction close, and the places, the subject matter of the various conveyances, contiguous, these are casual matters, which do not make it proper to say that they constitute parts of a series within the meaning of the section, and that there was no evidence of any interdependence. In my view, the conclusion at which the learned judge has arrived is correct. It has to be remembered that what is required under the section is a certificate, given without intent to defraud, which must appear on the conveyance, and such a certificate, from its very nature, must state that which is, or reasonably ought to be, within the knowledge of the parties. It cannot be because some third person, looking at the matter objectively, can discover by casual coincidence some serial incident that a series of transactions *inter partes* can be said to arise. I think that the preceding words relating to a "larger transaction" point to the order of series mentioned in the later limb which was in the minds of the legislature. The mischief to be considered was that persons in reality conveying for more than £500 should be able to evade their liability to double duty merely by breaking up that large transaction into a number of smaller transactions each of less than £500.

Similarly, where co-ordinated or interdependent transactions might not be so treated as to amount strictly in law to parts of "a larger transaction," nevertheless they might be so related that, in effect, one would cause or qualify another. In such a case, where the total amount of the consideration for the series was more than £500 and so might otherwise attract to itself a higher rate of duty, the series is not to escape the full rate by being dissected into artificially discrete parts. In other words, only genuine disparate transactions of less than £500 are to be favoured. It is significant in this connection to note that the language used is "part of a series of transactions" and not "part of a transaction in series."

But in this case, in law, each lot was genuinely the subject of a separate contract for sale: *Emmerson v. Heelis* (1); there is no evidence at all that the lots were not entirely independent. I agree with the learned judge in being unable to see that the arbitrary coincidence of time or place constituted any such interdependence as to form a series. The learned judge has found that the coincidence of the dealings was a matter of accident, and I agree with him.

I think, therefore, that this appeal should be dismissed with costs.

ROMER, L.J.: In the month of Sept., 1934, a number of houses in Walker Road, Newcastle, belonging to a Mrs. Waller and another as

trustees, were, together with certain other properties belonging to different owners, offered for sale by public auction. For the purposes of the sale, the houses were divided into six separate lots numbered 3 to 8 inclusive. The defendants duly bid for and became the purchasers of all the six lots for sums which, in the case of lots 3, 4, 5 and 7, were under £500, though the aggregate purchase money of the four lots was considerably in excess of that sum. The sales of the four lots were completed in due course by four separate conveyances to the defendants, each conveyance containing a clause in the words following :

It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500.

The object of inserting this clause in each conveyance was to bring the case within the proviso contained in the Finance (1909-10) Act, 1910, s. 73. The section is in these terms :

The stamp duties chargeable under the heading "Conveyance or Transfer on Sale of any Property" in the first schedule to the Stamp Act, 1891 (in this part of this Act referred to as the principal Act), shall be double those specified in that schedule : provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by sect. 122 of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed £500, and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500.

The question to be determined upon this appeal is whether, in the circumstances of the case, such a certificate as is mentioned in the section could properly be given in respect of any of the four conveyances. Before investigating those circumstances in detail, I would call attention to the fact that what has to be considered under the section is not whether the conveyance or transfer itself forms part of a larger transaction or series of transactions, but whether the transaction which is effected by the instrument can be said to do so. Now, the effect of a conveyance on sale is no doubt to vest in the purchaser the property conveyed. But the vesting itself is not a "transaction," though the conveyance that brings about the vesting may be. The section must, therefore, be referring to the transaction that is "carried into effect" by the conveyance or transfer ; that is to say, in a case like the present, the contract for sale. I propose, therefore, to examine the facts of this case with a view to ascertaining whether the contract of sale in respect of any one of the four lots in question formed part of a series of transactions within the meaning of the section. For it is not, and could not be, suggested that it formed part of a larger transaction ; that is to say, a larger contract of sale. That would have been the case had the defendants been taking separate conveyances of two or more properties included in the one contract. Lot 8, for instance, contained three

houses and was purchased by the defendants for a sum exceeding £500. Had the defendants chosen to take a separate conveyance of one of those houses, the transaction carried into effect by the conveyance, that is to say, the contract to purchase that house, would have formed part of a larger transaction, namely, the contract to purchase the three houses included in lot 8. A

I must now state the facts of the present case in more detail than I have done at present.

The property of Mrs. Waller and her co-trustee consisted of 14 houses in flats in Walker Street, Newcastle, each of the two houses included in lot 3 being stated in the advertisement of the sale to contain two rooms and scullery downstairs and two rooms and scullery upstairs, and the other twelve houses being therein described as "similar" to those two. The houses were numbered 935 to 969 (odd numbers) inclusive, and 979 to 997 (odd numbers) inclusive, each house apparently possessing two numbers. Mrs. Waller and her co-trustee can therefore be properly described as having been the owners of a series of houses, unless I am greatly mistaken as to the meaning of the word "series." For the purpose of the sale the houses were, as already stated, divided into six lots numbered 3 to 8 inclusive, each of the lots 3, 4, 5 and 7, consisting of two houses and each of the lots 6 and 8 consisting of three houses. At the auction, the defendants bid for and became the purchasers of all six lots. Immediately thereafter, six separate formal contracts of sale in respect of the said six separate lots were signed by or on behalf of the defendants, and all six contracts were, *mutatis mutandis*, in the same form. In my opinion, the contracts can be accurately described as a series of contracts. They were entered into as the result of a series of houses belonging to the same vendors having been offered for sale at one and the same auction in a series of lots, all of which were then and there bought by the same purchasers. F

It was contended on behalf of the respondents, and the contention found favour with the learned judge, that there cannot be a series of transactions within the meaning of the section unless there be some interdependence between them. The contention is stated in the judgment of the learned judge in these words: G

Mr. Laski, on behalf of the defendants, contends that "series" cannot be read in that wide sense, and that there must be, in the sort of series that are referred to in that section, some interdependence between the individual transactions which form the series. He has referred me to a number of cases which show that the buying of lots at auction constitutes separate contracts, and they only relate to each other so as to be in equity one contract, where there are circumstances known to both parties at the time of the auction which show that the bids of the purchaser were dependent upon his obtaining a good title to the other lot. H

He then refers to some of the authorities that Mr. Laski had cited, which included *Emmerson v. Heelis* (1), and *Holliday v. Lockwood* (2). But though these authorities undoubtedly show that there must be some

interdependence between two or more contracts before they can be treated as one, they do not, with great respect to the learned judge, have any bearing upon the present question. As I have already pointed out, no one has suggested that the contracts in the present case, or any
A two or more of them, constitute one contract. The question is whether they constitute a series of contracts, and upon that question those authorities throw no light. Take, for example, the case of *Emmerson v. Heelis* (1). It was held that the contracts for the purchase of several lots of turnips at an auction did not form one contract. Had the
B question been whether they formed a series of contracts, the answer would, in my opinion, have been in the affirmative.

But, as I understand the argument of the respondents, they do not contend that the contracts in the present case do not form a "series" in the ordinary acceptance of that word, but that the legislature must
C have intended to use the word in some more restricted sense, as connoting an interdependence between a number of transactions, yet one not sufficiently pronounced to constitute them one transaction within the meaning of the authorities that were cited. If this were the intention of the legislature, I can only regret that it did not give some intimation of the
D kind of transaction that it had in mind. For myself, I am unable to think of any that would constitute a series within this restricted meaning. But what reason is there to suppose that the legislature did not use the word in the sense in which it is ordinarily used? I can see none. It is plain that if the eight houses included in lots 3, 4, 5 and 7 had been
E included in one lot, or even in two lots, as they might well have been, the defendants would have been obliged to pay the increased stamp duty imposed by sect. 73, even if they had taken separate conveyances of the houses included in each of those lots. It is equally clear that, had all the eight houses, though bought by four separate contracts, been
F included in one conveyance, as might well have happened, the considerations being aggregated for this purpose into one sum, the stamp duty on the conveyance would have been at the increased rate. I cannot understand why, in the circumstances, it should be thought that the legislature did not intend the increased stamp duty to be paid, merely
G because the defendants chose to take four separate conveyances. I should have expected its intention to be precisely the contrary. I can see no reason whatsoever for supposing that it intended to use the word "series" in a sense that would relieve the purchaser in the present case from the increased duty. That cases may arise in which it will
H be difficult to say whether or not the conveyance or transfer carries into effect a transaction that forms part of a series of transactions, as I construe the word "series," no one will deny. But that, one would think, must be the case whatever construction be placed upon the word "series." In any case, the fact that such difficulties may, and perhaps

must, arise, is no reason for not attributing to the word "series" its ordinary meaning. If given that meaning, I am of opinion that it covers the case with which we are now concerned.

In my opinion the appeal should be allowed.

Although, to my regret, I find myself in disagreement with the other members of the court upon this question, I desire to express my entire concurrence in what SLESSER, L.J., has said as to the form of procedure adopted in this case. A

GREENE, L.J.: The question raised by this appeal arises under the Finance (1909-10) Act, 1910, s. 73, and is stated in the special case to be: B

whether each of the transactions effected by the four conveyances aforesaid formed part of a larger transaction or series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500. C

The facts of the case have already been sufficiently stated, but I shall have something to say at the conclusion of my judgment as to the manner in which the question is brought before the court.

The Finance (1909-10) Act, 1910, s. 73, provides in its opening words that: D

The stamp duties chargeable under the heading "Conveyance or Transfer on Sale of any Property" in the first schedule to the Stamp Act, 1891, . . . shall be double those specified in that schedule.

By the Stamp Act, 1891, s. 54:

the expression "conveyance on sale" includes every instrument, and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction. E

The Finance Act, 1898, s. 6, declares that the definition of a "conveyance on sale" in the Stamp Act, 1891, s. 54, includes a decree or order for, or having the effect of an order for, foreclosure. F
The Finance (1909-10) Act, 1910, s. 74, provides that conveyances operating as voluntary dispositions *inter vivos* shall be chargeable with stamp duty as if they were conveyances on sale with the substitution of the value of the property for the amount of the consideration.

The documents, therefore, which are to be charged with double duty are documents effecting a variety of transactions, and this circumstance, in my opinion, explains the use of the general term "transaction" in the proviso to sect. 73 of the Act of 1910 to which I now turn. G

The relevant words of that proviso are as follows:

Provided that this section shall not apply to the conveyance or transfer of any stock or marketable security as defined by sect. 122 of that Act, or to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed £500 and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds £500. H

In my opinion, the "transaction effected" by the documents now in question was, in each case, the conveyance of the property comprised therein to the purchaser. I do not take the view that the transaction effected is the antecedent contract. Each of the transactions effected

A by the four conveyances was a separate and independent transaction unconnected with the others. Each of them carried out a separate and independent contract unconnected with the contract carried out by the others. There was no relationship between the transactions effected by

B the parties were the same, the conveyances all bore the same date and the contracts which they carried out were all made on the same day and at the same place. The question which arises in this case is whether the mere existence of this relationship is sufficient to constitute each of these separate and independent transactions "part of a series of

C transactions" within the meaning of the section, since it was not, and could not be, contended that they formed part of a larger transaction. The learned judge held that the transactions did not form part of a series of transactions, and I agree with him.

In approaching the construction of the relevant words of the section,

D there are, in my opinion, three matters which it is important to bear in mind. The first is that it is the presence of the certificate in the conveyance which, by the section, gives rise to the exemption from double duty. In so far as it is open to the Crown by some appropriate method to challenge the propriety of a certificate, it is, I think, proper

E to apply the rule that a tax is not to be imposed except by clear language. In my judgment, if the legislature had intended that a relationship, such as exists in the present case, between separate and independent transactions would constitute each transaction part of a series, it should have said so in clear terms, for example, by using some such words as "one

F of a number of substantially contemporaneous transactions."

The second matter is that, once the facts are ascertained, the question whether they fall within the language used in the section is a question of the construction of the section, and therefore a question of law: see *Farmer v. Cotton's Trustees* (3), per LORD PARKER OF WADDINGTON, at p.932. It is,

G therefore, in my judgment, illegitimate to treat the question as a question of fact or, as it is sometimes put, a question of degree, which is the same thing expressed in a different way. The statement that a transaction forms part of a series involves a tacit finding as to the meaning of the word "series" in its context, and, for my part, I am unable to take so

H easy a path in order to arrive at a solution of the present difficulty. It is, in my judgment, incumbent upon those who assert that a number of transactions constitute a series within the meaning of the section at least to point to some quality in them which, upon some intelligible ground, removes them from the category of separate transactions and

unites them under the head of a series. In the arguments addressed to us on behalf of the Crown I have been unable to discover any such intelligible ground, since the elements which it was suggested will convert what is not a series into a series appear to me to be quite fortuitous and incapable of being referred to any intelligible ground of differentiation. A

The last matter is this. The proviso leaves it to the parties to determine and certify whether or not the transaction forms part of a series of transactions. Presumably, therefore, the legislature thought that the question whether or not a certificate could properly be given would be readily determined, and would not require a consideration of the exact weight to be given to a number of matters of fact, a question upon which different views might well be taken. The certificate is to be the certificate of both parties to the transaction—or, it may be, of a number of parties—and it can scarcely be supposed that the legislature intended to confront them with nice questions upon which there might well be acute differences of opinion. Yet the refinements by reference to which, according to the Crown's contention, the question would fall to be decided, will inevitably lead to such a result. B C

I now turn to a consideration of the crucial words of the section. The word "series" must be read in its context, which is "part of a larger transaction or of a series of transactions." The expression "part of a series" suggests, to my mind, that by a series is meant something of which it can be said there is some integral relationship between its parts. It does not, I think, convey the idea that all that is required is that the transaction should be one of a number of transactions related to one another in time or space or both. This view is, I think, strengthened by the fact that the expression "part of a series of transactions" stands in juxtaposition to the expression "part of a larger transaction." Many instances can be thought of where it might be doubtful whether a transaction could properly be described as "part of a larger transaction," but where, by reason of the presence of an integral relationship with other transactions, it could be said to form "part of a series of transactions." And here it is of importance to remember that the class of transactions effected by documents covered by the section is a varied one. Thus, it covers the case where in one action (or under one reference) by successive orders of the court (or of commissioners) different parts of a property become vested in a purchaser. Again, a builder developing a building estate might have under one contract an option to purchase different plots at different times, so that each option, when exercised, would create a separate contract. In each of these cases, it would at the least be a matter of doubt whether a particular order or conveyance could be said to form part of a larger transaction, but there would, I think, be in each case such an integral relationship between the transactions as to constitute each indubitably part of a series of D E F G H

transactions. In my opinion, read in its context, the phrase "part of a series of transactions" is intended to sweep in cases where the relationship between the transactions is an integral, and not a fortuitous, one, depending merely on such circumstances as contiguity of place, but is
A such that it would not, or might not, be sufficient to bring them within the phrase, "part of a larger transaction."

Apart from the fact that, in order to constitute a series, the vendor and the purchaser must in each transaction be the same, the Crown's argument requires no relationship between the various transactions
B except one which is to be built up by means of a number of matters of fact. Thus, in the present case, the facts that the houses were all of the same type, that they were all situated in the same street, that they were sold at the same auction sale on the same day, were all added together in order to make the required "series." But what if they had been of
C different types, or in different streets, or had been sold on two successive days, or on the same day in two different auction rooms? And what if contracts made on different days were all carried out by conveyances made on the same day? It is, in my judgment, no answer to the criticism involved in these questions to say that it is the combination of
D facts which constitutes the transactions a series, since this statement tacitly involves an answer to the question, "What is a series?" and begs the question of construction. Indeed, my criticism of the Crown's contention is that it shirks the difficulty. Mr. Stamp contended that mere contiguity in time would convert into a series something which
E would not otherwise be a series. I cannot myself accept the view that the question falls to be determined by such nice considerations. In the course of the argument I put to the Attorney-General the question whether, if a mortgagee of four separate properties under four separate mortgages began four separate foreclosure actions on the same day and
F obtained four separate foreclosure decrees on the same day, these decrees would each form part of a series of transactions. His reply was that it would depend on such matters in the history of the mortgages as whether or not they were executed on the same day and whether or not the mortgagor had been in the habit of paying the interest by one cheque.
G Indeed, whenever the Crown's contention was closely examined, it did not appear, to my mind at any rate, to provide any satisfactory principle for distinguishing what is from what is not a series in this taxing statute.

The question is, no doubt, one of difficulty, but on the whole, giving the matter the best consideration that I can, I have come to the con-
H clusion that the appeal should be dismissed.

Before concluding this judgment, I wish to say a word as to the manner in which the question has been raised before the court. The proceedings take the form of a claim by the Attorney-General on behalf of His Majesty for a penalty under the Stamp Act, 1891, s. 5. It was not

explained to us how, in the absence of the intent to defraud the Crown which that section requires, a penalty could be recovered—it certainly cannot be suggested in the present case that there was any intent to defraud. But it is said (whether rightly or wrongly) that proceedings under sect. 5 afford the only means of having the substantial question A determined, and that the respondents have agreed to have it determined in this way. Speaking for myself, I do not think that the court should be asked to adjudicate on a matter which is raised before it upon an assumption of fact which is not true, particularly when that assumption is based on an agreement between the Crown and a subject by which B the subject is to be treated as having committed a criminal offence of which he is quite clearly not guilty.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Gale & Phelps*, agents for *Sebag, Cohen & Co.*, Sunderland (for the respondents). C

[Reported by DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

THE “KAFIRISTAN.”

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J.), **December 14, 15,** D
16, 1936.]

Shipping—Salvage—Collision—Apportionment of blame—Salvage services by ship in same ownership as ship in collision—Remuneration.

The “*Empress of Britain*” collided with the “*Kafiristan*,” blame being apportioned by agreement as to three quarters to the “*Empress of Britain*” and one quarter to the “*Kafiristan*.” The “*Kafiristan*” was badly damaged and salvage assistance was rendered, *inter alia*, by the “*Beaverford*.” The owners of the “*Beaverford*” were also the owners of the “*Empress of Britain*.” The owners of the “*Beaverford*” claimed salvage:— E

HELD: as the “*Empress of Britain*” was partly to blame for the collision and her owners were also the owners of the “*Beaverford*” such owners were not entitled to a salvage award for services rendered to the “*Kafiristan*.” F

[EDITORIAL NOTE. The question here is whether the doctrine that no one can profit by his own wrong extends to the case of a salvage claim, where the damage is done by a ship in the same ownership as the vessel claiming the salvage award. G It was clear that no such claim could be made where the ship in fault was wholly to blame and it is here held that the principle equally applies where that ship is only partly to blame.

AS TO DISQUALIFICATIONS FROM CLAIMING SALVAGE, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 565, 566, para. 855; AND FOR CASES, see DIGEST, Vol. 41, pp. 843, 844, Nos. 7055-7068.]

Cases referred to: H

- (1) *The Capella (Cargo Ex)* (1867), L.R. 1 A. & E. 356; 41 Digest 850, 7133.
- (2) *The Hannibal, The Queen* (1867), L.R. 2 A. & E. 53; 41 Digest 712, 5488.
- (3) *Melanie (Owners) v. San Onofre (Owners)*, [1925] A.C. 246; 41 Digest 850, 7132.

(4) *The Beta* (1884), 9 P.D. 134; 41 Digest 850, 7131.

(5) *The Glengaber* (1872), L.R. 3 A. & E. 534; 1 Asp. M.L.C. 401; 41 Digest 843, 7059.

(6) *The Duc d'Aumale* (No. 2), [1904] P. 60; 41 Digest 837, 6990.

(7) *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363; 12 Digest 251, 2053.

A (8) *The Glenfruin* (1885), 10 P.D. 103; 41 Digest 843, 7056.

(9) *Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna*, [1926] A.C. 655; 41 Digest 802, 6624.

(10) *The Parlement Belge* (1880), 5 P.D. 197; 41 Digest 815, 6758.

B APPEAL from a judgment given by BUCKNILL, J., on Nov. 12, 1936, in the Probate, Divorce and Admiralty Division, and reported in [1936] 3 All E.R. 563, disallowing a claim for salvage made by the Canadian Pacific Railway Co., the owners of the "Empress of Britain" and the "Beaverford."

C In June, 1935, the "Empress of Britain" collided with the "Kafiristan" and damaged her so badly that she required salvage assistance. The "Empress of Britain" stood by until the "Beaverford," which was owned by the same company, came up; she then left, and the "Beaverford" towed the "Kafiristan" about 100 miles and contributed to her ultimate safety. The company (the claimants) and the owners D of the "Kafiristan" signed a Lloyd's form of salvage agreement, and the question of liability for the collision was afterwards settled on the footing that the "Empress of Britain" was 75 per cent. and the "Kafiristan" 25 per cent. to blame. At arbitration before SIR WILLIAM RAEBURN, K.C., the owners of the "Kafiristan" raised the question E whether the claimants could recover salvage if the "Empress of Britain" was wholly or partly to blame for the collision, and a case was stated for the court. BUCKNILL, J., considered that circuity of action could not be pleaded in defence to the claim, and that it could only be pleaded when the defendants would be entitled to recover from the plaintiffs F the same amount of damages as the plaintiffs sought to recover from the defendants. He could not find any clear guiding principle in the authorities, and decided against the claimants, "guided by due regard to the benefit conferred, combined with due regard to the general interests of ships and commerce": *per* GORELL BARNES, J., in *The Duc d'Aumale* (No. 2) (6).

G The claimants appealed.

R. F. Hayward, K.C., and *Vere Hunt* for the appellants.

J. V. Naisby and *G. N. W. Boyes* for the respondents.

H *Hayward, K.C.*: The learned judge has misread the case of *The Capella* (1) in two places. He took the view that one of the sets of claimants in that case was the owners of one of the wrongdoing ships. No man can profit by his own wrong, but it is also important to encourage salvors. The reason why SIR ROBERT PHILLIMORE in *The Glengaber* (5) disregarded that principle was that he was satisfied that there was no

prior conspiracy between the two vessels belonging to the claimants; therefore that learned judge considered that the interests of shipping in general made it desirable that if a ship which was wholly unconnected with the act of mischief rendered salvage, her owners should be rewarded although they also owned the ship which had caused the damage. The A principle that no man may profit by his own wrong has therefore no application in the present case. Moreover, the learned judge said he did not understand why the decision in *The Glengaber* (5) was not cited in *The Glenfruin* (8). It was unnecessary to do so, because in *The Glenfruin* (8) the whole question was decided by the doctrine of circuitry B of action, which bars a claim by a ship which is wholly to blame.

The tendency to personify a ship still holds good to-day in appropriate cases: *per* LORD SUMNER in *Admiralty Commissioners v. Susquehanna (Owners)*, *The Susquehanna* (9). *The Glengaber* (5) lays down the clear principle that where there is no question of conspiracy or temptation, the C general doctrine should apply that salvors should be encouraged. The learned judge suggested that the appellants could recover their out-of-pocket expenses by including them in the claim of the "Empress of Britain," but they could only recover 25 per cent. of those expenses. He is also wrong in saying that those expenses would rank in the appellants' D claim for damages. They are too remote, for the salvage of the "Kafiristan" did not arise out of the collision with the "Empress of Britain." The out-of-pocket expenses arose by reason of the wholly independent act of the master of the "Kafiristan" in asking the "Beaverford" to save her. E

SLESSER, L.J.: Are you not profiting by your own iniquity?

Hayward, K.C.: No, because in Admiralty the ship is personified, and the "Beaverford" was an innocent agent. There is a legal difference between the cases where a ship is partly and wholly to blame: circuitry of action. No court will entertain a claim which F is useless because it will bring in a cross-claim and put the parties in the same position as they were at the outset. If this salvage award were made, then in the collision action each vessel would file its list of damages, and part of the damages of the "Kafiristan" would be the amount of salvage she was called upon to G pay. Of that sum she would recover three-quarters and have to bear one-quarter. The cost of the salvage service will therefore have to be paid as to half by the owners of the "Empress of Britain" and as to nothing by the "Kafiristan."

The learned judge also misread *The Capella* (1) in saying that the H decision in that case prevented the claimants from being entitled to salvage for services rendered by the "Empress of Britain" to the "Kafiristan." *The Capella* (1) has no bearing on the present case, because the claim there was not made by the owner.

SLESSER, L.J. : Why is it in the general interests of commerce that the ship which does the damage should claim salvage ?

Hayward, K.C. : She may well be induced to salve in order to lessen her financial liability to the damaged ship.

A SLESSER, L.J. : Exactly the same motive would apply if the "Empress of Britain" had done the damage by another agent.

Hayward, K.C. : That must be so. A ship that is wholly to blame cannot recover : *The Duc d'Aumale* (No. 2) (6) ; therefore the "Empress of Britain" could not recover. Under the Maritime Conventions Act, 1911, the "Kafiristan" has to pay for her proportion of the damage, part of which is the expense of this salvage. If this judgment stands, the "Kafiristan" will be absolved from paying part of her damage. If she had been wholly responsible, the Act would not apply, because there is no division to be done—no cross-claim. There is no authority
C contrary to *The Glengaber* (5).

In *The Duc d'Aumale* (No. 2) (6), a tug under contract to tow a vessel claimed salvage from her tow. The courts always scrutinise such claims carefully, and that consideration may well have influenced GORELL BARNES, J. His Lordship said, in dismissing the claim of the crew,
D that they had done no more than they were under a duty to do. *The Glenfruin* (8) throws no doubt on *The Glengaber* (5), and has nothing to do with this case. In *The Glenfruin* (8) the claimants of salvage were wholly to blame, and were liable under their warranty to pay all the salvage that they might recover.

E The doctrine of personification was dealt with by SIR ROBERT PHILLIMORE in *The Parlement Belge* (10). In any report of Admiralty cases before 1900, the ship is spoken of to the exclusion of her owners. The process of an Admiralty action *in rem* is to sue the ship in the name of her owners. This case should be envisaged as one of a ship which, in
F the words of GORELL BARNES, J., is wholly unconnected with the act of mischief, and which, therefore, on the authority of *The Glengaber* (5) and *The Duc d'Aumale* (No. 2) (6), is entitled to salvage.

GREER, L.J. : In this case a collision took place between a vessel called the "Empress of Britain" and the "Kafiristan" on June 16,
G 1935, in the Gulf of St. Lawrence. The owners of the "Empress of Britain" are also owners of the "Beaverford" and they were represented at the time of the collision, and the subsequent services rendered by the "Beaverford," by their agents, the masters and crew of the two vessels. One vessel being by agreement in fault to the extent of 75 per cent.,
H whereas the "Kafiristan" was in fault in respect of only 25 per cent., I take the view that, if this matter were *res integra*, there is no rule of justice whereby it can be said that even a vessel at fault ought not to be able to recover for salvage services. It may very well be that a vessel wholly in fault has, at the time that the salvage service commenced,

only damaged the other vessel to a very small extent, and that, by the efforts of the vessel in fault, the damage sustained has been confined to that very small extent which existed at the commencement of the salvage services. I can understand the view that in these circumstances the owners of the vessel, though in fault, who had, by means of excep- A
tional exertions and exceptional expenses, brought the damaged vessel to safety, ought to have been encouraged in doing that which they were under no obligation to do, their only obligation being under the Merchant Shipping Act, 1894, s. 422, to stand by and to save life.

I think the circumstances might readily be such that a vessel entirely B
at fault with reference to the collision might very properly be encouraged to render salvage services which would more than wipe out the fault that it had already committed. It does not seem to me, strictly speaking, that that is a case of the owners of a vessel taking advantage of its own wrong. So far from taking advantage of its own wrong, it is trying to C
set right the wrong which it has done. That position with regard to a ship which is entirely at fault is much stronger in the case of a ship which has been at fault, since the Act of 1911, only in a lesser degree, because the vessel which is in fault only in a lesser degree ought to be, one would think, encouraged to do its level best to reduce the D
cost to the owner of the salvaged vessel by exercising exertions for its safety whereby everybody is benefited, not only the salvaged vessel, but the other vessel that will have to pay a larger proportion of the damage under the Act of 1911. Before 1911, as I have been quite properly E
reminded, the result, where both were in fault, was that each bore half of the damage; it is only under the Act of 1911, in consequence of an agreement with other nations, that the court was entitled to award F
different proportions; but I cannot help thinking that that makes no difference to the long accepted rule that in the Admiralty Court a vessel which is either wholly or in part to blame cannot recover in respect of G
salvage services. I think that is too well settled by a number of cases that have been referred to, beginning with the case of *The Capella* (*Cargo Ex*) (1) and continuing to the other cases, and the way in which those cases have been accepted as cases decided in accordance with sound principles by a number of authorities. They are set out on p. 257 G
of TEMPERLEY'S MERCHANT SHIPPING ACTS (4th Edn.) in these terms:

Salvage. The question whether the statutory obligation to stand by after collision debarb salvage is discussed in KENNEDY, CIVIL SALVAGE, 2nd Edn., p. 30. The general rule would seem to be that where the ship standing by is in no way to blame, she may rank as salvor if her services are really of the nature of salvage.

Then the cases of *The Hannibal* (2), *The Melanie* (3), and *The Beta* (4), H
are referred to, and the learned author continues:

Where she has been wholly or in part to blame, no claim can be entertained for salvage services rendered. *The Capella* (*Cargo Ex*) (1), *The Glenyaber* (5), *The Duc d'Aumale* (No. 2) (6).

The cases that my Lord has referred to show quite clearly, in my opinion, that that has been accepted in the Court of Appeal and in the House of Lords as a rule which has been established in the Admiralty Court. Decisions which we have heard given necessarily mean that the
A learned judges and the learned Lords who were deciding those cases did so solely on the ground that the party claiming the salvage was an innocent party and that their decision would have been quite otherwise if the party claiming the salvage had not been an innocent party but had been a party in part or in whole responsible for the collision. I
B personally regret that that is the view that prevailed, and I should not be sorry to see some statutory provision that would do away with the effect of the accepted decisions on the subject.

I do not think I need further refer to the authorities except by saying that *The Glengaber* (5), which was very much relied upon here, is a very
C unsatisfactory decision. I cannot myself ascertain from the report whether the liability was confined by the learned judge who decided that case to the owners, who were owners of both ships, or whether the liability was decided on the ground that it arose as against all the owners of the ship, whether they were part owners of the vessel that was to
D blame, or whether they were not part owners of the vessel that was to blame.

In the result, I have no doubt that the proposition which I have put forward has been well established and well accepted in the Admiralty Court, and, in the case of *The Duc d'Aumale* (No. 2) (6), I agree with
E what has been said by Mr. Hayward, that it did not directly raise the question. GORELL BARNES, J., did in fact say that he accepted the decision in *The Glengaber* (5), a decision that a vessel which was wholly to blame for the collision could not recover any salvage. It seems to me that if a vessel which was wholly to blame cannot recover
F any salvage under any circumstances, then a vessel which could only be responsible for half of the damage should be equally in a position of not being able to claim. As I have said, I regret the decision, because I cannot help thinking, having regard to the fact that salvage is a voluntary operation which a vessel is not bound to engage upon by any
G rule of law, it is a matter of regret that vessels are not encouraged, even where they are in fault, to carry on salvage operations.

A great deal has been said in this case about the fact that these were two separate vessels, the salving vessel, the "Beaverford," belonging to the same owners, being a different vessel from the "Empress of Britain,"
H though in the same ownership, the "Empress of Britain" being to blame for the collision to the extent of 75 per cent. and being therefore disentitled to salvage. It seems to me to follow as a matter of course that her owners, who were also the owners of the "Beaverford," were equally disentitled to claim salvage. It is quite true that for many

years for the purpose of convenience the name of a vessel has been treated as the equivalent for the name of the owners of the vessel. I think that is a mere matter of convenient procedure in the Admiralty Court and to enable the reporter of Admiralty cases to refer to cases by the name of the vessel rather than setting out in full that the litigation was between the owners of vessel A. and the owners of vessel B. A

For these reasons I am satisfied that the learned judge was right in the decision that he came to. It was the only decision that he could come to, and I think it is the only decision that we can come to, though it is possible that a higher tribunal may consider and revise these cases which have lasted for so long. For these reasons I think that the appeal should be dismissed. B

SLESSER, L.J. : The principle which is expressed in the maxim *jus ex injuria non oritur* is of general application. It is stated by LORD C MANFIELD, C.J., in the case of *Montefiori v. Montefiori* (7) that no man shall set up his own iniquity as a defence any more than as a cause of action, and in civil law, in Vol. I of POTHIER'S *TRAITÉS DU DROIT*, at p. 186, there is a similar expression, which I mention in case it may be said that the civil rather than the common law is applicable to an Admiralty dispute. In the present case, as my Lord has stated, the vessel which is admittedly the wrongdoer to the extent of 75 per cent. of the blame, the "Empress of Britain," is owned by the same company, the Canadian Pacific Railway, as the ship which seeks to be remunerated for salvage, namely, the "Beaverford," and, as I read the authorities, which seem to me entirely consistent with the principles which I have mentioned, there is no doubt, at any rate, of this, that had the ship which sought to be remunerated for salvage been itself a wrongdoer, the principles of law would have prevented that ship from recovering in its claim. That is made perfectly clear in the case of *The Capella* (Cargo F *Ex*) (1). DR. LUSHINGTON, at p. 357, said, in language which appeals very much to my mind :

I do not seek for authorities, but I look to the principle which ought to govern the case. In my mind the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English court. G

That authority was quoted with approval by GORELL BARNES, J., as he then was, in *The Duc d'Aumale* (No. 2) (6). At p. 74 he cites, as a fortification of the conclusion to which he had there come, that the wrongdoer could not claim remuneration, the case of *The Capella* (Cargo H *Ex*) (1), and the language which I have cited. As against that, it has been said that we have here to distinguish by reason of the fact that in the case of *The Duc d'Aumale* (No. 2) (6), and in the case of *The Capella*

(*Cargo Ex*) (1), the wrongdoing ship was itself claiming salvage, whereas here you have two different ships, albeit in the same ownership, and in support of the proposition that each ship shall be so personified that the doctrine to which I have referred shall not extend beyond the wrongdoing ship so as to affect their owner claiming salvage through another ship, certain passages in the case of *The Glengaber* (5) have been relied upon. At p. 402 SIR ROBERT PHILLIMORE speaks thus :

I know of no precedent for saying that because a vessel belongs to the same owner as the vessel which has done the mischief (being wholly unconnected with the act of mischief itself, and there being no suggestion of any conspiracy—which, of course, would create a totally different state of circumstances—no suggestion of any conspiracy between the two vessels, the one to cause the mischief and the other to assist in remedying it), such a vessel cannot recover salvage reward. I know of no case in which such a suggestion has been put forward, and therefore know of no instance in which it has been sustained, therefore I do not uphold it in the present case.

There are certain earlier observations which go to indicate that SIR ROBERT PHILLIMORE was not perhaps in those observations committing himself to the thing which he there seems to state in such general terms, for he limits it above to those who were not joint owners of the ship.

That was, of course, a case of the old system of holding ships by shares, and not a case of holding by one incorporation. For myself, I agree with Mr. Hayward that if those words are to be treated in their natural terms, perhaps extended beyond the facts of that particular case, they do seem to indicate that in the case of SIR ROBERT PHILLIMORE, expressed in 1872, he would have thought that, in the absence of conspiracy, the mere fact that the salving vessel belonged to the same owner as the wrongdoing vessel would not disentitle the salving vessel ; and that is said after the case of *The Capella* (*Cargo Ex*) (1), which had already decided in 1867 that where the salving vessel was itself a wrongdoer her owners would be disentitled. I cannot see that what is there said by SIR ROBERT PHILLIMORE can be supported here upon principle. The principal here, the owner, who is really the claimant though suing as owner of the “Beaverford,” has in fact two instruments, one, the ship, the “Empress of Britain,” which does the injury, and the other the “Beaverford,” which endeavours to repair it, and charges, or seeks to charge, for that attempt at reparation. I am unable to see, if it be right that the wrongdoer is himself disentitled to claim salvage, what difference it makes that the owner claims salvage through two instruments and not through one instrument, and if there be anything in *The Glengaber* (5) to the contrary—and I am inclined to think there is—then I would say that, very respectfully and very regretfully, I cannot follow that decision. It follows, therefore, in my view, that this case falls directly within the authority to which my Lord has called attention, and is consistent with the later treatment of the matter in the cases to

which the Lord Justice has referred arising under the Merchant Shipping Act, 1894, s. 422, and its predecessors: *Melanie (Owners)* v. *San Onofre (Owners)* (3), and *The Beta* (4).

I have only to refer to one other argument which Mr. Hayward put to us, which I understand to be this. It was Mr. Hayward's contention that, by reason of the operation of the Maritime Convention Act, 1911, s. 1, which enables a court to divide the loss in proportion to the degree in which each vessel was in fault, in contradistinction to the earlier rule, which had a long history to be found in MARSDEN'S COLLISIONS AT SEA, 9th Edn., p. 151, that half damage would normally be given when both vessels were to blame, some change had been made in the law which would have the effect of altering the view which the court might otherwise have taken with regard to *The Duc d'Aumale* (No. 2) (6), and the earlier cases. I am unable for myself to understand the contention. Under the earlier law, as I have pointed out, it was always in the power of the court to apportion the damages, though the apportionment was by half and half. Later that power to apportion was widened, so that, in the language of sect. 1 of the 1911 Act, it might be in proportion to the degree in which each vessel was in fault. The alteration, if alteration there was, in principle was one which was made in the seventeenth century. According to MARSDEN, there having been only one case in the sixteenth century where partial damages were given to distinguish it from the older system, in 1614, says the learned author, was the last case of half damages. If any change therefore were made in the system of damages, the change took place not in 1911 but in 1614, a date which I think is of no assistance to Mr. Hayward in the present appeal. Therefore, I think the appeal fails.

SCOTT, L.J.: I agree with the judgments that have been delivered, and particularly with the view that the application of the rule barring the owners of a vessel in fault and causing the casualty which occasioned the need for salvage, from recovering salvage remuneration, is of too old a standing for this court to call it erroneous. It was indirectly considered by the House of Lords in the case of *Melanie (Owners)* v. *San Onofre (Owners)* (3), and their Lordships seem to me in effect to have assented to it. If the rule is to be modified judicially, I agree that it must be done by the House of Lords. Whilst expressing this view of the legal position, I do feel that the operation of the rule calls for consideration in the circumstances of modern shipping and of the Maritime Conventions Act, 1911. Legislation giving the Admiralty judge discretion to give a salvage award in such circumstances, perhaps modified in amount, might be a possible solution. The present decision seems a hardship on the plaintiffs, and it may be in the general interest that the

rule should be altered. I venture, therefore, to suggest that the Board of Trade might investigate the whole question.

Appeal dismissed.

Solicitors: *William A. Crump & Son* (for the appellants); *Middleton, A Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the respondents).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

B ADMIRALTY COMMISSIONERS v. " VALVERDA " (OWNERS)

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J.), **October 29, 30, November 2, 3, December 17, 1936.**]

C *Shipping—Salvage—His Majesty's ships—Special agreement—Public policy—Merchant Shipping Act, 1894 (c. 60), s. 557—Merchant Shipping (Salvage) Act, 1916 (c. 41), s. 1.*

The " Valverda " was disabled and certain Admiralty vessels went to her assistance and towed her to port. When the casualty was reported to the owners of the " Valverda," they entered voluntarily into a salvage agreement with the Admiralty, no distinction being made between the ships taking part in the salvage, of which some were specially equipped for salvage within the Merchant Shipping (Salvage) Act, 1916, s. 1, and others were not. The right of the Admiralty to salvage was admitted in respect of the ships specially equipped for salvage, but was disputed in respect of those not so specially equipped :—

E HELD [GREER, L.J., dissenting]: (i) the courts have no jurisdiction to consider claims for salvage services which are outside the Merchant Shipping Act, 1894, s. 557, and the Admiralty were, therefore, not entitled to salvage remuneration in respect of the ships not specially equipped for salvage.

(ii) the agreement was an agreement to contract out of the statute, and was therefore invalid.

F [EDITORIAL NOTE. The Court of Appeal have by a majority reversed the decision of BRANSON, J. The position now is that Admiralty ships which are not specially equipped for salvage are not entitled to claim a salvage award, and any agreement to pay remuneration for their services is contrary to statute and illegal.

G AS TO SALVAGE SERVICES BY THE ROYAL FORCES, see HALSBURY, 1st Edn., Vol. 25, Royal Forces, pp. 4, 5, para. 5; and FOR CASES, see DIGEST, Vol. 39, pp. 318-322, Nos. 27-95. The statutes referred to appear in HALSBURY'S COMPLETE STATUTES OF ENGLAND as follows: Merchant Shipping Act, 1894: 18 Statutes 162; Merchant Shipping (Salvage) Act, 1916: 18 Statutes 585.]

Cases referred to:

- H (1) *The Mary Ann* (1823), 1 Hag. Adm. 158; 41 Digest 865, 7355.
 (2) *The Thetis* (1833), 3 Hag. Adm. 14; 41 Digest 823, 6817.
 (3) *The Lustre* (1834), 3 Hag. Adm. 154; Digest Supp.
 (4) *The Ewell Grove* (1835), 3 Hag. Adm. 209; 41 Digest 875, 7519.
 (5) *The Neptune* (1824), 1 Hag. Adm. 227; 41 Digest 225, 633.
 (6) *The Waterloo* (1820), 2 Dods. 433.
 (7) *The Iodine* (1844), 3 Notes of Cases, 140; 39 Digest 319, 32.



- (8) *The Sarpen*, [1916] P. 306; 41 Digest 846, 7085.
- (9) *The Matti*, [1918] P. 314; 41 Digest 166, 72.
- (10) *Westmore v. Paine*, [1891] 1 Q.B. 482; 33 Digest 411, 1212.
- (11) *Wilson v. McIntosh* (1894), 63 L.J.P.C. 49; 38 Digest 749, case f.
- (12) *Midland Ry. Co. v. Withington Local Board* (1883), 11 Q.B.D. 788; 38 Digest 123, 905. A
- (13) *Park Gate Iron Co., Ltd. v. Coates* (1870), L.R. 5 C.P. 634; 42 Digest 761, 1872.
- (14) *Griffiths v. Dudley (Earl)* (1882), 9 Q.B.D. 357; 42 Digest 762, 1875.
- (15) *R. v. Berstrand* (1867), L.R. 1 P.C. 520; 14 Digest 309, 3261.
- (16) *Re Stapleford Colliery Co., Barrow's Case* (1880), 14 Ch. D. 432; 9 Digest 298, 1849. B
- (17) *Gregory v. Torquay Corpn.*, [1911] 2 K.B. 556; 32 Digest 540, 1927.
- (18) *Morris v. Baron & Co.*, [1918] A.C. 1; 39 Digest 398, 341.
- (19) *Maddison v. Alderson* (1883), 8 App. Cas. 467; 44 Digest 179, 80.
- (20) *The Vine* (1825), 2 Hag. Adm. 1; 41 Digest 841, 7035.
- (21) *The Raikes* (1824), 1 Hag. Adm. 246; 41 Digest 866, 7376.
- (22) *The Spirit of the Age* (1857), Sw. 286; 41 Digest 887, 7727. C
- (23) *The Louisa* (1813), 1 Dods. 317; 39 Digest 319, 38.
- (24) *The Rosalie* (1853), 1 Ecc. & Ad. 188; 41 Digest 873, 7495.
- (25) *The Rapid* (1838), 3 Hag. Adm. 419; 39 Digest 321, 65.
- (26) *The Wilsons* (1841), 1 Wm. Rob. 172; 39 Digest 321, 66.
- (27) *The Charlotte Wylie* (1846), 2 Wm. Rob. 495; 39 Digest 319, 33.
- (28) *The Bombay* (1832), 3 Hag. Adm. 148, n.; 41 Digest 941, 8318. D
- (29) *The Earl of Eglinton* (1855), Sw. 7.; 41 Digest 871, 7460.
- (30) *The Alma* (1861), 1 Lush. 378; 39 Digest 320, 47.
- (31) *The Woosung (Cargo Ex)* (1876), 1 P.D. 260; 41 Digest 856, 7222.
- (32) *The Dalhousie* (1875), 1 P.D. 271, n.; 39 Digest 320, 48.
- (33) *The Cybele* (1878), 3 P.D. 8; 39 Digest 316, 7.
- (34) *Admiralty Comrs. v. Page*, [1919] 1 K.B. 299; 39 Digest 317, 11. E
- (35) *The Morgana*, [1920] P. 442; Digest Supp.
- (36) *China Navigation Co., Ltd. v. A.-G.*, [1932] 2 K.B. 197; Digest Supp.
- (37) *Wells v. Gas Float Whitton No. 2 (Owners)*, [1897] A.C. 337; 41 Digest 850, 7137.
- (38) *The Calypso* (1828), 2 Hag. Adm. 209; 41 Digest 823, 6816.
- (39) *The Stiklestad*, [1926] P. 205; 41 Digest 833, 6927. F
- (40) *Williams v. Mersey Docks & Harbour Board*, [1905] 1 K.B. 804; 36 Digest 131, 870.
- (41) *Pearson & Son, Ltd. v. Dublin Corpn.*, [1907] A.C. 351; 1 Digest 588, 2250.
- (42) *Coventry v. Great Eastern Ry. Co.* (1883), 11 Q.B.D. 776; Digest Supp.
- (43) *Admiralty Comrs. v. S.S. Chekiang*, [1926] A.C. 637; 41 Digest 805, 6663.
- (44) *Aranson v. Liverpool Corpn.* (1913), 77 J.P. 176; 32 Digest 545, 1984. G
- (45) *Graigola Merthyr Co., Ltd. v. Swansea Corpn.*, [1928] Ch. 31; Digest Supp.
- (46) *Foster v. Usherwood* (1877), 3 Ex. D. 1; 16 Digest 118, 167.

APPEAL from a decision of BRANSON, J., dated Feb. 19, 1936, and reported in [1936] 1 All E.R. 350.

K. S. Carpmael, K.C., and *H. G. Willmer* for the appellants. H

G. St. C. Pilcher, K.C., and *O. L. Bateson* for the respondents.

Carpmael, K.C.: This is the first time the Admiralty have ever claimed salvage. Under the Merchant Shipping Acts the Admiralty are not entitled to claim salvage and any agreement to the contrary is

illegal. Contracts to pay a reasonable amount of salvage are within the law, but "reasonable" means that salvage which is claimable in law. Any other meaning is contrary to statute and this court cannot entertain a claim for it. Prior to 1853, the Admiralty were paid their

- A out of pocket expenses in cases where naval ships rendered assistance, and up till then officers and men were entitled to payment on the same scale as private salvors. The Merchant Shipping Act, 1854, ss. 484, 485, limited the payments to officers and men for their personal services. These two sections were combined in the Merchant Shipping Act, 1894, s. 557. The Merchant Shipping (Salvage) Act, 1916, s. 1, makes an exception from the general rule in the case of ships that are specially equipped for salvage, but no action will lie for salvage services outside these Acts. [Counsel referred to the King's Regulations and Admiralty Instruction, art. 900.] An agreement is presumed to be made with knowledge of the law as it is at the time the agreement is made. One would expect to find in it a clause saying "notwithstanding anything contained in sect. 557." See *Griffiths v. Dudley (Earl)* (14).

- D Salvage was always of a personal nature by the officers and crew of the ships concerned. Until steam came into use, towage was rare; and until a ship itself was risked, there could be no claim by its owner. There was always considered to be a duty on the King's ships to assist vessels in distress; that may be why claims of this sort were never made. The effect of the Acts as translated by the Court of Appeal is to say that the Admiralty cannot claim salvage. Therefore they cannot enter into an agreement to save, and, if made, such an agreement would be void and unenforceable. [Counsel referred to *The Louisa* (23), *The Mary Ann* (1), *The Thetis* (2), *The Lustre* (3), *The Ewell Grove* (4), *The Rapid* (25), *The Wilsons* (26), *The Iodine* (7), *The Charlotte Wylie* (27), *The Bombay* (28), *The Rosalie* (24), *The Earl of Eglinton* (29), *The Alma* (30), *The Woosung (Cargo Ex)* (31), *The Dalhousie* (32), *The Cybele* (33), *The Sarpen* (8), *The Matti* (9), *Admiralty Comrs. v. Page* (34), *The Morgana* (35), *China Navigation Co., Ltd. v. Attorney-General* (36), *Wells v. Gas Float Whitton No. 2 (Owners)* (37), *The Calypso* (38), *Griffiths v. Dudley (Earl)* (14).]

- G *Pilcher, K.C.*: There is no obligation on a King's ship or on a private vessel to render salvage. Salvage must essentially be voluntary, and if there is any duty to render a service, that service cannot be salvage. The Marine Conventions Act, 1911, s. 6, imposed a duty to assist individuals, but there is no legal duty, only a moral one, to assist vessels in distress. King's ships have claimed for salvage and got it, but the services rendered must have been voluntary. It is submitted that when the appellants signed the contract they knew quite well what the position was, and what it would have been if the contract were not signed. It is agreed that by virtue of sect. 557 no claim could have been made for

damage or expenses ; therefore the contract must have been signed on the basis that these services were to be paid for. It is admitted that the Admiralty have never before claimed for salvage except in the case of *The Matti* (9), and even in that case they did so by saying that it was not one of His Majesty's ships. In *The Thetis* (2) only expenses A were claimed. It is also admitted that since 1853 all the judges of the High Court and the Court of Appeal appear to have regarded sect. 557 as a complete bar. But all their remarks were *obiter*, except in the case of *The Matti* (9), when the point was not really before them. The agreement is clear and the intention of the parties was that salvage B was to be permitted. It is customary to grant salvage in cases where help is asked : *The Stiklestad* (39). The services are now more often by request than voluntary, and it is customary to reward salvors who merely stand by and take no active part.

Before 1852, it was the practice of the Admiralty to render aid when C required, and no claims were made for salvage as such ; the officers and men were nominally parties to any claim, and, except in *The Thetis* (2), the Lords Commissioners were not represented ; even in that case, they only claimed for out of pocket expenses. That was the only case D in which the Admiralty were awarded a sum of money, though there have been cases in which they have asked for an indemnity for their out of pocket expenses before they would assist, e.g., *The Lustre* (3). Since 1852 the Admiralty have required their consent to be given before the officers and men make a claim, and that consent is not lightly given, E but only in cases where the services given were of an important character. There was no obligation upon anyone to go to the assistance of the "Valverda." If the crew were in danger, there was a duty to take F them off, but there was no obligation on the Admiralty to incur expense. A responsible member of the underwriters signed the agreement ; he cannot now be heard to say that the contract is void, after the Admiralty G have spent some £4,000. There is nothing to prevent a person from contracting out of a statute unless the statute says in terms that you shall not so do or says that the courts shall not entertain an action H upon such a contract. The general rule is that you can contract out unless it is contrary to public policy : *Williams v. Mersey Docks & Harbour Board* (40), *Griffiths v. Dudley (Earl)* (14). In early days towage was rare ; the legislators did not intend sect. 557 to apply to towage. Here the "Valverda" was towed nearly 1,000 miles. The officers and crews took a minor part ; the vessel herself as a salvage instrument did nearly everything. Although these were salvage services, this action is a claim on a contract and sect. 557 is limited to cases where there is no contract between the parties ; the words are not wide enough to cover both. There is no authority that one cannot contract out of words of this kind ; no principle of public policy is involved : *Pearson &*

Son, Ltd. v. Dublin Corporation (41), *Coventry v. Great Eastern Ry. Co.* (42). [Counsel also referred to *The Louisa* (23), *The Ewell Grove* (4), *The Lustre* (3), *The Waterloo* (6), *The Sarpen* (8), *Admiralty Comrs. v. S.S. Chekiang* (43), *The Spirit of the Age* (22).]

- A *Carpmael, K.C.*, in reply : All vessels have to use their best endeavours to save life and property : King's Regulations, art. 896. There was a duty, not enforceable by law, but of imperfect obligation. Salvage services are those which save property, or assist in saving it : *Wells v. Gas Float Whitton (No. 2) (Owners)* (37). The Admiralty can add a
- B claim for work and labour done. But what is being claimed here is not salvage services at all. In *The Iodine* (7) the claim was by the officers and crew and the remuneration awarded was less than if a captain had risked his own ship. *The Matti* (9) was a clear decision that the Admiralty cannot claim salvage ; so was *The Morgana* (35).
- C The 1916 Act admits it, except for certain types of vessel. A party may waive a benefit conferred on him by statute, except in the case of a public authority, when it is improper so to do : *Aronson v. Liverpool Corporation* (44). But if you have no benefit to waive, you cannot waive it : *Graigola Merthyr Co., Ltd. v. Swansea Corporation* (45). You cannot
- D give the courts a jurisdiction which does not exist : *Foster v. Usherwood* (46). The parties here were not contracting with a view to waiving any rights under sect. 557 ; if the Admiralty were doing that, they should have said so. [Counsel also referred to *Maddison v. Alderson* (19), *Morris v. Baron & Co.* (18), and *Midland Ry. Co. v. Withington Local*
- E *Board* (12).]

GREER, L.J. : Before the statute of Queen Anne's reign (12 Anne St. 2, c. 18, s. 2 (Ruff.) or Stat. (1713) 13 Anne c. 21, s. 2) no private ship or Queen's ship was under any duty to assist vessels in distress.

- F This statute imposed a duty which was to last for three years. This statutory duty was continued for a further period, and then repealed. It is therefore necessary to consider what, if any, was the duty of the King's ships at common law before the Merchant Shipping Act, 1853. In *The Mary Ann* (1) LORD STOWELL, in giving his judgment, said, at
- G p. 158 :

In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H.M. sloop "Arab" ; and, undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the state, and although there is an obligation upon King's ships to assist the merchant vessels of this country ; yet when services have been rendered, those who confer them are entitled to an adequate reward.

- H In *The Thetis* (2), a claim was made on behalf of the officers for salvage remuneration, and on behalf of the Admiralty for expenses to the amount of £13,833, incurred for pay, etc., in H.M. ships "Lightning," "Adelaide," and "Algerine." The Admiralty were separately repre-

sented. In giving judgment SIR CHRISTOPHER ROBINSON said, at pp. 61, 62 :

The claim on the part of the Admiralty for the wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors ; and it is said to be unprecedented, but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs in cases of private salvors ; and such claims have constantly been allowed. The claim is more novel in form than in principle, and new classes of cases may be expected to require new rules. The Lords of the Admiralty are but trustees for the public, in regulating the employment of H.M. ships ; and *they must act as they think proper in regard to the terms on which they may be permitted to engage in such services as these.* A

These words, from " they must act " down to the end of the sentence, I have italicised. B

There is, undoubtedly, a difference between the assistance afforded in ordinary cases, by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and stores, to a service of this kind, for 18 months together. I am, however, not called upon to give any opinion on this claim, as it is not opposed, but admitted, on the part of the owners and of the Admiral ; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service. C

I regard this case as deciding that the Admiralty are entitled to salvage in respect of the work done by the ship, and in this and subsequent cases such as *The Lustre* (3), and *The Ewell Grove* (4), the claim is based on the title of the Admiralty to claim salvage. In *The Ewell Grove* (4), at p. 225, SIR JOHN NICHOLL, after citing the facts, said : D

I have therefore no doubt as to the title of H.M. steam vessels, in cases of civil salvage, to remuneration. E

There are many cases to the same effect, and it was admitted that, down to the Act of 1853, the Admiralty frequently claimed, and were awarded, salvage in respect of such expenses as are referred to in *The Thetis* (2), but they never put forward any claim beyond repayment of their actual expenses, and never claimed salvage, in respect of the benefits conferred on the salvaged vessel by the work the vessel did, apart from the claim for expenses. I think it quite unnecessary to go further into the cases that were cited on behalf of the appellant as to the right of the Admiralty to claim salvage before the Merchant Shipping Act, 1853, repealed in the Act of 1854, and now contained in the consolidating statute. As sect. 557 of the Act of 1894 merely reproduces the provisions of the Acts of 1853 and 1854, I need not cite any of the statutory provisions other than sect. 557. That section provides : F G

(1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved. (2) Any document purporting to give the consent of the Admiralty for the purpose of this H

section, and to be signed by the secretary to the Admiralty or on his behalf, shall be evidence of that consent. (3) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs.

It will be observed that this section does not deprive the Admiralty of the legal right which they have to say that their ships shall not be used for salvage services. As pointed out in KENNEDY, 3rd Edn. at p. 28:

Voluntariness on the part of the salvor is . . . an essential element in the constitution of a salvage service. The salvage of property has been described as the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea, under the responsibility of making restitution, and with a lien for their reward. "What is a salvor?" said LORD STOWELL in *The Neptune* (5) [at p. 236]. "A person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship." It is to be observed that, except in the peculiar case of the passenger on board a vessel in distress, the requirement of voluntariness in the salvor is satisfied by the absence of any contractual or official obligation. There is a universal moral obligation, where life or property is in peril at sea, to render every possible assistance in its preservation. "It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it."

The last words are a quotation from the judgment of LORD STOWELL, then SIR W. SCOTT, in *The Waterloo* (6) at p. 437.

It is clear from this that neither a private vessel nor a King's ship is under any obligation to perform salvage services. The owners of a King's ship may say without any breach of legal duty: "We are not prepared to undertake salvage services to your vessel. We are afraid you must wait until some other vessel comes along in readiness to proffer voluntary salvage service, but, if you will enter into an agreement with us to pay us for the salvage services you require us to render, we will render those services." The question for determination here is whether such a contract is made invalid and unenforceable by reason of the express provisions of the Merchant Shipping Acts. In my judgment, the provisions of those Acts do not have that effect. If it had been so intended, I should have expected the section to read: "Where salvage services are rendered by any ship . . . whether under contract or otherwise, no claim shall be allowed." In my judgment, when the owners of the "Valverda" were asked to sign the contract which they signed in this case, they were entitled either to sign or to refuse to sign, and if they had refused to sign and the ship had still performed the salvage services, the owners of the King's ship would have been prohibited by the section in the Merchant Shipping Act from recovering anything for any loss, damage, or risk caused to the salving ship such as stores, tackle, or furniture, or for the use of any stores, or other articles belonging to His Majesty. But inasmuch as the Admiralty were under no obligation to perform any salvage services whatsoever, they could sell their freedom from such obligation at whatever price they considered right, provided that they could induce the free agent of the ship which wanted to be salvaged to agree to the remuneration that they asked. The

Admiralty could legally have said : " Our ships are required for other services, and we will not take them away from usual and recognised duties for difficult salvage services unless you agree to pay us £11,000." They could equally have said what they did in this case : " You cannot have the services of the King's ships unless you agree to pay the reasonable remuneration you would have to pay to a private salvor." A

I have not thought it necessary to state in detail the facts that are so clearly stated in the award, and in the early part of the judgment of BRANSON, J. As appears above, I think the contract which the owners of the salvaged ship entered into by their agent is a binding contract between the Admiralty and the owners of the salvaged vessel. B

Another question was raised in the case with regard to the construction of the agreement, that is to say : " Does the agreement mean that the salvors were only asking for the remuneration which they were entitled to recover in the absence of agreement under the Merchant Shipping (Salvage) Act, 1916, s. 1." In my judgment, it is impossible so to read the contract. At the time the agreement was signed, the services of salvage tugs were not within the contemplation of the parties, though in fact at a later period such services were rendered. Two of the ships in respect of which the claim is made, namely, " Frobisher " and " Guardian," had been standing by and giving assistance before the date of the agreement. The " Frobisher " reached the ship on the morning of Jan. 22, and proceeded to take her in tow. The agreement provides that the provisions of the agreement shall apply to the services rendered before the date of the agreement, Jan. 25, as if they had been wholly rendered after the signing of the agreement. It is impossible to avoid the conclusion that the agreement has reference to the services rendered by the King's ships in making fast to the " Valverde " and starting to tow her to a place of safety. Cl. 4 of the agreement provides that the remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage. I think that means a reasonable amount of salvage in respect of all the services rendered by Government vessels, and cannot possibly be confined to services rendered by salvage tugs or such other vessels as are within the provisions of the Act of 1916. The agreement went on to provide for payment of actual out of pocket expenses in case the efforts of the salvaging ship were not successful. It seems to me impossible to suppose that the agreement was such as would give a better result to the Admiralty in case of non-success than they would have had in case of success. The claim of the King's ship is in my judgment a claim not for salvage services, but a claim for money due under an agreement, and there is nothing in the Merchant Shipping Acts which renders such an agreement invalid in law. C D E F G H

BRANSON, J., in his judgment, especially relied on two cases, *The Iodine* (7), and the judgment of BANKES, L.J., in *The Sarpes* (8). With

all respect to the learned judge, I do not think the decision in *The Iodine* (7), or the judgment of BANKES, L.J., to which I have referred, affords any authority for the proposition that since the passing of the Merchant Shipping Acts the Admiralty are entitled to claim to be paid

A for salvage due under express agreement. I think *The Iodine* (7) does confirm the view I have already expressed that the Admiralty before the Merchant Shipping Act, 1853, were entitled to claim salvage, though it was usual to claim a less remuneration on account of the vessel being the property of the King. It seems to me that all that is proved by

B the many cases cited with regard to the rights of the King's ships before 1853 is that, though they were entitled to make salvage claims, they in fact always confined their claims to out of pocket expenses. The actual decision in *The Sarpen* (8) does not touch the present case. The decision was that the salving ship there was not a ship belonging to His

C Majesty, and therefore her owners were entitled to recover salvage. I do not think either the decision in *The Sarpen* (8), or the judgment of BANKES, L.J., affords any assistance to the decision of the present case.

Mr. Carpmael, for the appellants, relied on *The Matti* (9), but I think it does not bear on the question, as the towage agreement there referred

D to was not an agreement between the owners of the "Matti" and the Admiralty, but between the owners of the "Nunthorpe," a private vessel, and the owners of the "Matti."

There is, admittedly, no case in which it has been decided that, since the Merchant Shipping Act, 1853, the Admiralty, as owners on behalf

E of the Crown of a King's ship, cannot make a legally binding contract under which, in consideration of the ship's giving salvage assistance which it is not bound to give, the owners of the salved ship promise payment for the salvage services. As there is no express provision that the Admiralty shall perform salvage services, I think there is nothing

F in sect. 557 of the Act of 1894 which makes it illegal for the Admiralty to agree that, if they do that which they are not bound to do, i.e., stand by the ship and tow her to safety, they are to receive remuneration, or which renders a promise made by the owners of the salved ship to pay for such services illegal and void. For these reasons, I agree

G with the learned arbitrator and with BRANSON, J., that the Admiralty are entitled to recover the remuneration provided for in the agreement which was freely signed by the agent of the salved ship, who must be taken to have known the law and the provisions of the Merchant Shipping Acts, and notwithstanding those provisions to have been willing, in case

H the services were rendered, to pay in the same way as he would have had to pay a private vessel undertaking the services without an agreement. I am of opinion that the arbitrator's decision and that of BRANSON, J., should be upheld, and this appeal should be dismissed with costs.

SLESSER, L.J. : In this case, I abstain from expressing any view as to the position regarding the efficacy of claims for salvage services rendered by any ships belonging to His Majesty apart from legislation.

In my opinion, the whole matter which falls to be considered in this case is whether the effect of the Merchant Shipping Act, 1894, s. 557 (in effect consolidating early sections of the Acts of 1853 and 1854), has taken away from the Crown rights which it would otherwise possess, and, if it has so deprived the Crown of power to claim for salvage services, to what extent the restriction of rights has been carried ; to which must be added the problem whether, notwithstanding the restrictive legislation, a special agreement can be made to pay the Crown as salvor and whether the rights of defendants to seek protection from claims in the statute can be made the subject of waiver. The whole legislation which has to be considered for this purpose is now contained in the Merchant Shipping Act, 1894, s. 557 (1), (3), together with the Merchant Shipping (Salvage) Act, 1916, s. 1. The language of the relevant section of the 1894 Act is as follows :

(1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved. (2) Any document purporting to give the consent of the Admiralty for the purpose of this section, and to be signed by the secretary to the Admiralty or on his behalf, shall be evidence of that consent. (3) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs.

Sect. 1 of the 1916 Act contains the following provision :

1. Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in the Merchant Shipping Act, 1894, s. 557, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty.

In the present case, in so far as services were rendered by ships which fall within the 1916 Act, as specially equipped with salvage plant or a tug, the appellants admit that under the agreement dated Jan. 25, 1935, between themselves and the Admiralty, the remuneration may be fixed by arbitration and they do not dispute their liability. This covers the two ships the "Creole" and the "Sandboy," but with regard to the claim for salvage remuneration in respect of the "Frobisher," the "Guardian" and the "Orangeleaf," vessels not within the 1916 Act, they say that the provisions of sect. 557 of the 1894 Act that "no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles

belonging to Her Majesty, supplied in order to effect those services," preclude the court from entertaining any such claim ; and that notwithstanding a special agreement, if any, to pay therefor. It was argued by Mr. Carpmael that in so far as these matters are not claimable, the

A salvage agreement, which has been cited by my Lord, of Jan. 25, 1935, must be read as applying only to services claimable by statute, that is, the services of commander or crew under sect. 557 (1) of the 1894 Act, or under the 1916 Act, and that the parties must be taken to have contracted with a knowledge of the existing law. In my view, this con-

B tention fails ; either there is power in the parties by special agreement to produce a legal relation, notwithstanding the statute which may deal with all services rendered, or there is no such power. In the latter case, the agreement cannot operate upon the excluded matters. In the

C former view, if the parties can contract without limitation, there is nothing in the language of the contract to show that any discrimination is made between salvage ships and tugs and the services of officers and men for salvage generally and the other matters dealt with in sect. 557. Their agreement as such is entirely general in its terms, and provides for remuneration for any services rendered.

D I have, however, come to the conclusion that Mr. Carpmael is right when he says that this court has no jurisdiction to entertain a claim for services which have been mentioned as excluded by the section. The language appears to me to be express in its terms, and I think that he is right when he contends that the learned judge was in error in applying

E the principles of what is generally known as "contracting out" to this case. It is true, as the learned judge observes, that there are cases where provisions in a statute for the benefit of a particular person or class of persons may be waived by them. *Quilibet renuntiare potest juri pro se introducto*. But though equity may interfere to prevent the machinery

F of an Act of Parliament being used by a person to defeat equities which he has himself raised, so as to get rid of a waiver created by his own acts, conditions imposed by statutes which authorise legal proceedings to be taken, and which are essential to give jurisdiction, cannot be waived, nor can provisions which in terms exclude the right to claim. Conditions

G precedent to jurisdiction cannot be waived: *per* POLLOCK, B., in *Westmore v. Paine* (10), at p. 484. See, for example of the former class, *Wilson v. McIntosh* (11), at p. 134, *per* DAVEY, L.J., a case of a waiver of an obligation to file a case within a certain time, a decision of the Privy Council ; so also, in dealing with a case under the Public Health

H Act, 1875, where it was alleged that the limit of time for bringing of action had expired, the whole Court of Appeal seem to have been of opinion that the waiver of such a right was possible, though on the facts there was no waiver in that case: *Midland Railway Co. v. Withington Local Board* (12). The matter is very clearly stated in *Park Gate Iron*

Co., Ltd. v. Coates (13), where notice of appeal and security was required by statute, where, in the language of BOVILL, C.J., such notice :

seems to me . . . to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this be so, it falls within the rule that either party may waive provisions which are for his own benefit.

The case of *Griffiths v. Dudley (Earl)* (14), cited by the learned judge is another example of the same principle, and the critical question in this case to be answered is whether the provision in sect. 557 can be waived in the interest of a limited class (as in the present case by inducing the Admiralty to perform services which otherwise they might not perform, or were, at most, under an imperfect obligation to perform, by promising to pay them for such services), or whether this section, rightly regarded, is not one of general public provision extending beyond a particular class. Conditions enabling or disabling for the general purpose of the public cannot be waived: *R. v. Bertrand* (15), and *Re Stapleford Colliery Co., Barrow's Case* (16), at p. 444. The distinction appears to me to be a valid one to be drawn between statutes dealing with procedural or private rights, which may be renounced, and specific public enactment denying jurisdiction to hear the action.

In the present case, I see no reason to assume that sect. 557 is merely inserted for the protection of the class of persons who may receive salvage services from His Majesty's ships. There having arisen, in the many cases which have been cited, considerable doubt as to the extent of the Crown's right in these matters, I think that the Act of 1853 was concerned unambiguously to declare the law, so that all parties, the Admiralty, their officers and men, the owners of ships and the public at large, might know the extent of the liability. The very nature of the duties of His Majesty's ships primarily to defend his sovereignty indicates the public nature of acts which arise from deviations from that duty involved in salvage operations and the like. Moreover, the language of sect. 485 of the Act of 1854, now substantially embodied in the latter part of sect. 557 (1) of the Act of 1894—a subject matter dealt with in part in 12 Anne St. 2, c. 18, s. 2 (Ruff.), which now, in its final form, limits the rights of officers and men of His Majesty's ships to claim salvage without the consent of the Admiralty—points to the public nature of the legislation. It is *pro publico introducto*.

The discussion before us on public policy does not seem to carry the matter any further, for if the statute be of general application, public policy clearly requires the observance of its provisions; *privatorum conventio juri publico non derogat*. If it were not for public purposes, it is difficult to see what policy is served by preventing the Admiralty from claiming remuneration for services which might otherwise conceivably not be rendered.

Being of opinion, as I have stated, that the prohibition of the right to

claim for the services is general in its nature, and not enacted solely for the benefit of those persons who are to receive the services, I come to the conclusion that the legislation is of the kind which cannot be waived, and that this court has no jurisdiction to entertain a claim for the services by the section excluded. As SCOTT, L.J., has arrived at the same conclusion, it follows in the opinion of the majority of this court that this appeal succeeds.

SCOTT, L.J. : This is an appeal by the owners of a salved ship, cargo, and freight, against a decision of BRANSON, J., upon a case stated by an arbitrator. It raises questions as to the meaning of the Merchant Shipping Act, 1894, s. 557 ; as to the true interpretation, in the light of that section, of a certain salvage agreement between the Admiralty and the owners of ship, cargo, and freight in a position of present peril ; and, if that agreement be interpreted in one way, as to whether certain claims made by the Admiralty in their own interest, i.e., on behalf of the Crown, and assessed by the learned arbitrator at £4,500, are, notwithstanding the statute, legally enforceable under the agreement so construed. These three questions of law may be put shortly : (i) what does the agreement mean, (ii) what does sect. 557 mean, and (iii) is the apparent scope of the agreement indirectly cut down through the statute making it wholly or partly unenforceable ?

It will be convenient, however, before discussing question (i) to begin by quoting in full the only two statutory provisions which have to be considered in the course of this judgment. Sect. 557 is as follows :

(1) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved. (2) Any document purporting to give the consent of the Admiralty for the purpose of this section, and to be signed by the secretary to the Admiralty or on his behalf, shall be evidence of that consent. (3) If a claim is prosecuted and the consent is not proved, the claim shall stand dismissed with costs.

The history of the section is this : the first part of subsect. (1), prohibiting certain claims, was originally introduced as sect. 39 of the Merchant Shipping Law Amendment Act, 1853 (which is printed in the King's Printer's copy of the statutes after sect. 40). The wording was practically the same as that of the first half of sect. 557 (1) to-day. In the consolidating Merchant Shipping Act, 1854, sect. 39 of the 1853 Act became sect. 484. In the 1853 Act there was nothing equivalent to the second part of subsect. (1), and sect. 557 (2), (3), but an enactment on the subject of the consent of the Admiralty to proceedings by the commander or crew of His Majesty's ships on lines similar to those in

sect. 557 of the 1894 Act, was included in the 1854 Act, as sect. 485. In 1894 the substance of sect. 485 was re-enacted in the second half of sect. 557 (1), although the details as to procedure and proof of consent contained in sect. 557 (2), (3), are somewhat different to sect. 485 of the 1854 Act. So far as the present appeal is concerned, the net result is that the relevant part of sect. 557 originally became law in an amending Act in the year 1853. That part of sect. 557 was amended by the Merchant Shipping (Salvage) Act, 1916, s. 1. Sect. 1 is as follows :

Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in the Merchant Shipping Act, 1894, s. 557, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty.

The facts have already been sufficiently summarised by GREER, L.J. ; they are clearly and fully stated in the award.

For the purpose of construing the agreement (and particularly in view of certain passages in the learned judge's judgment), it is desirable to set out a good deal of it *in extenso*. At the moment of its execution the salvage services had already been started, but nothing turns on that fact, and the clause of the agreement relating to it need not concern us. The agreement was made between an agent for the owners of the ship (thereinafter called the master or owner), cargo, and freight, of the one part, and the Admiralty, of the other. The relevant parts are the following :

(1) The Admiralty agree to use such endeavours as they or their officers may in their absolute discretion think fit to save or assist the ship "Valverda" and her cargo and freight, if any, and the master (or owner) hereby engages the services of the Admiralty for such purposes. . . . (3) The remuneration under this agreement for any services rendered shall, unless agreed with the Admiralty, be fixed by arbitration in London, as hereinafter provided. (4) The remuneration shall, if the services are successful or beneficial, consist of a reasonable amount of salvage. (5) If the services are not successful or beneficial, then the actual out of pocket expenses incurred by or on behalf of the Admiralty in the endeavours to save or assist the said ship and her cargo and freight, together with compensation not exceeding £350 for any loss or damage incurred in such endeavours, shall be the measure of the remuneration payable to the Admiralty under this agreement, but there shall not be included in the said expenses or compensation any charge for the use of any ship or tug belonging to His Majesty. (6) The Admiralty shall, after the termination of the services, notify the committee of Lloyd's of the amount for which the Admiralty may require security to be given. (7) Pending the completion of the security as aforesaid, the Admiralty shall have a maritime lien on the property saved for their remuneration, and the master (or owner) hereby undertakes not to remove or to permit the removal without the consent of the Admiralty of the property saved or any part thereof from the port of or the place of safety to which the property is taken or at which it is left by the Admiralty on the completion of the salvage services until security has been given to the satisfaction of the committee of Lloyd's. In consideration of this undertaking, the Admiralty engage not to arrest or detain the property saved unless the security be not given within 14 days of the termination of the services or the Admiralty have reason to believe that the removal of the property saved is contemplated contrary to the above undertaking. (8) The amount of the remuneration payable under this agreement, and any other question which may arise out of this agreement, shall be referred to the sole arbitration of an arbitrator to be appointed by the committee of Lloyd's.

Before the arbitrator no dispute arose as to H.M.S. "Sandboy" and H.M. yardcraft "Creole," which fell for all purposes within the 1916 exception to the Merchant Shipping Act, 1894, s. 557. Para. 10 of the award says :

The Admiralty contended that, by virtue of the terms of the salvage agreement hereinbefore referred to, they were entitled to claim in respect of the services of all five ships ; they further contended that, apart from the said agreement, they would, in the circumstances above set out, have been entitled so to claim.

By para. 12, the learned arbitrator upheld the above contention and awarded £11,000 as a lump sum payable under the terms of the agreement, the question of distribution as between the Crown as owners of the ships and the captains and crews not having been referred to him. The question left to the court in para. 13 was :

Whether upon the facts hereinbefore set out, the Admiralty are entitled in law to salvage remuneration in respect of the services of H.M.S. "Frobisher," H.M.S. "Guardian," and R.F.A. "Orangeleaf" ;

and by para. 15 he fixed at £6,500 the figure to which the award should be reduced if para. 13 should be answered by the court in the negative, £4,500 thus being the sum at which he assessed the services of the three ships not within the 1916 Act.

Question (i). What does the agreement mean ? Does its language cover the claims to which para. 13 of the award relates ? Assuming that the agreement was one into which it was open for the parties to enter, the learned judge has held that the arbitrator's interpretation was right if the agreement is to be construed as :

an agreement between two parties *sui juris* and according to the meaning of the language used without reference to anything else.

By this hypothesis he intended to eliminate any disability resting by law, either unwritten or statutory, upon the Admiralty, and possibly also upon owners desiring to contract with the Admiralty. On that hypothesis I should concur in his interpretation. But to make the hypothesis at all was, I think, a mistake ; it could not help in the solution of the first question in the case, viz., what is the meaning of the agreement in the light of that legal disability ? Does not the statutory inhibition necessitate an interpretation which will restrict the wide meaning of cl. 1 and cl. 3 to such claims for salvage remuneration as the law, written and unwritten, allows either the Admiralty or the personnel of His Majesty's vessels to make for the use of His Majesty's ships ? On this question of construction it is to be observed that the agreement was on the printed "Admiralty standard form of salvage agreement" which was established in 1917, just after the Act of 1916 came into force. To ships coming within that Act it would be wholly applicable ; but when used for His Majesty's ships not of the kind within that Act, difficult questions of interpretation are left open. The agreement does not

in express terms say that it is intended to confer on the Admiralty the right to claim, and to impose upon "the master or owner" the correlative obligation to pay remuneration of the kind forbidden by the statute. Nor does the mere fact that the Admiralty are contracting parties throw any light on the problem of construction; for the agreement covers various services for which the Admiralty could claim on their own behalf; and for the rest the Admiralty were plainly acting in the matter as agents for the commanders and crews of His Majesty's vessels in respect of personal services to be rendered by the latter. What is there, then, in the language of the agreement, to justify our interpreting it as intended to enlarge the Admiralty's rights, either in their own behalf, or on behalf of officers and men, beyond the limits allowed by law, so as to give them a remuneration to which, without an agreement, they would have no right?

Whatever the unwritten law was before 1853, the main provision of sect. 557 has been on the statute book since that year, and is by far the most important of all "surrounding circumstances" which can throw light on the interpretation of the agreement. If it was the intention of the parties to exclude the operation of the statute, they could easily have said so. I see no such express words as seem to me necessary to do that. It seems to me to follow that, if it is possible to construe the agreement as limited to "allowed" claims, that construction must be right. I agree with the learned judge and the learned arbitrator that, apart from the legal inhibition, the wider meaning of the agreement would be the more natural, but on the whole, although not without doubt, I think that the agreement can, and therefore should, be construed in the narrower sense of an undertaking to pay such salvage remuneration as is not barred by the conjoint operation of the two Acts of 1894 and 1916, and no more. It follows that on this first ground I answer the arbitrator's question in the negative.

But if my interpretation is wrong and that of BRANSON, J., is right, and for that reason the agreement does expressly cover the banned heads of salvage remuneration, my further questions (ii) and (iii) arise, viz., as to the meaning of sect. 557, and as to its effect upon the agreement; and the answers to them may lead to the same practical result, as my answer to question (i).

Question (ii). The meaning of sect. 557. I do not think that there can be any real dispute about the meaning of the section; the words "no claim . . . shall be allowed for (x), (y), (z)" are too plain. It is indeed conceded on behalf of the Admiralty that the whole of the £4,500 of remuneration described in para. 13 of the award falls strictly within the category of claims for remuneration which the section says "shall not be allowed," and that in a salvage action in the Admiralty Division, had there been no agreement, the Admiralty suing as plaintiffs would

have failed to get judgment for the £4,500 or any part of it. That being so, I think the legal conclusion follows, that the section must be interpreted as meaning that the banned claims are not to be allowed in the King's courts; and if they are not allowed there, it also follows that no such cause of action can exist.

Question (iii). What is the effect of sect. 557 upon the agreement, if my answer to question (i) is wrong? Is an agreement made for the express purpose of creating by contract a cause of action for salvage remuneration falling within the statutory ban enforceable in the courts, notwithstanding the statute? This issue was described by counsel as a question whether the parties could contract out of the statute. However it is stated, it turns upon the effect to be given to the words "no claim shall be allowed" as applied to the elements of reward described in the section. Some point was made on behalf of the Admiralty, before BRANSON, J., and before us, in relation to this issue that the agreement should be regarded as "a common law agreement" and not as "a salvage agreement." I am not quite sure what difference in legal consequences it is contended would follow if it were the one rather than the other; but anyhow I do not think that the agreement is "a common law agreement"; it is expressed throughout in language which preserves the characteristics of Admiralty salvage. This appears particularly in cl. 7 in relation to the maritime lien for salvage; no maritime lien can be conferred by contract, and the clause must accordingly be read as referring to the lien resulting in accordance with the law of the Admiralty Court, from salvage services recognised by that court as true salvage service; that lien must be the lien which the salvors have acquired by operation of law outside the agreement. For that reason the word "have" in the sentence "Pending the completion of the security as aforesaid the Admiralty shall have a maritime lien" must be read as meaning "retain," until the security is completed. For the same reason cl. 7 has no application to cl. 5; for the true maritime lien attaches only to property salvaged. It is just an ordinary salvage agreement such as has always been treated in the Admiralty Court as leaving untouched the inherent legal characteristics of true salvage. In that court salvage is none the less salvage because there has been some agreement about it: see EDWARDS ON ADMIRALTY JURISDICTION (1847), p. 189:

Such an agreement is no bar to the jurisdiction of the Admiralty Court . . . such agreements are frequently pronounced for, and not allowed to be set aside unless under strong and sufficient reasons;

for the Admiralty Court has always a power of its own to re-open such agreements: see KENNEDY, 3rd Edn., p. 249. I am not forgetting that, although the right to remuneration for a maritime salvage probably had its origin in the jurisdiction of the Admiralty (see KENNEDY, 3rd Edn.,

pp. 3, 4), it was also recognised by English courts of common law. But the common law right differed in two respects—the proceeding was *in personam*, and a common law possessory lien took the place of the maritime lien: see ABBOT ON SHIPPING (1812), 4th Edn., p. 407, the last edited by LORD TENTERDEN himself; repeated in 1824, 5th Edn., A p. 398. I cannot, however, see that it makes any difference to any question in the present appeal whether it is an Admiralty agreement or a common law agreement which we are asked to construe and enforce.

If I am right in the view I have expressed that sect. 557 abolishes the cause of action for any of the banned heads of remuneration, it is not a long step towards two further conclusions, viz., (i) that the King's courts are deprived of jurisdiction to consider those claims, and (ii) that a rule of public policy is thereby laid down. That the words "no claim for . . . shall be allowed" express a direction to the courts, before which such claims might have come had no such statutory prohibition been passed, not to allow any claim of the prohibited kind, I cannot doubt. In so far as the courts are so directed, their jurisdiction is affected; and, if a court's jurisdiction is taken away, it is the duty of the court of its own motion to refuse to entertain an excluded claim. This seems to me the one plain part of the natural meaning conveyed D by the express words used. A further direction is in my view given to the Admiralty itself and to the personnel of the Navy. But if no claim is to be allowed by either the Lords of the Admiralty, or the personnel of the Navy performing salvage services, for salvage remuneration for "loss, damages, or risk caused to His Majesty's ships or other property, E or for the use of stores, etc., belonging to His Majesty, or for any other expense or loss sustained by His Majesty by reason of that service," how are we to escape the conclusion that an agreement, which provides for the doing of the very thing which the Act says is not to be allowed, is an agreement to do an unlawful thing?

An argument was addressed to us (and also to BRANSON, J., who accepted it) urging that there is similarity between the words "no claim for . . . shall be allowed," and words of some other statutes where the view has been taken judicially, or at least followed by practitioners and not rejected judicially, that the particular words therein enacted were G inserted for the benefit of the party concerned, and are therefore to be construed as granting him a privilege, which he may waive on the principle *Quilibet renuntiare potest juri pro se introducto*. To this argument I reply, that we have to construe the words of this particular section, and that we have not had any statute cited to us by counsel for H the Admiralty which contains precisely the same, or even very similar, words, still less a statute so worded which has also been judicially construed in accordance with the argument. The statute upon which most reliance was placed by BRANSON, J., was the Public Authorities Protection

Act, 1893. But there are two distinctions, (i) the words are not the same, nor are they similar; they are "where any action is commenced" it "shall not lie or be instituted unless commenced within six months." Those words do not purport to negative the cause of action or make it unlawful to make the claim; they assume the existence of a lawful claim and merely impose a procedural limitation of time for the institution of legal proceedings to enforce it, in order that public authorities may be protected from stale claims. It is thus in essence a statute of limitations, as was held in *Gregory v. Torquay Corporation* (17): see per PICKFORD, J., at p. 560. I recognise that the words of that Act "no action shall lie or be instituted" *prima facie* have a superficial similarity to "no claim shall be allowed" in this Act; but there is no underlying similarity. The whole purpose of that Act was not to prevent claims being put forward, but to ensure that there should be no unreasonable delay in bringing them forward; and that of itself is sufficient to justify a wholly different interpretation of the two phrases. Besides, I do not feel sure that if the point had been argued in 1894 the court would have construed the Act as leaving the cause of action still effective after the six months period if the defendant authority did not raise the defence; it might have taken the view that it was the duty of the court itself to raise the question. There has been such a long and unbroken practice since 1893 of regarding the Public Authorities Protection Act as affording an optional defence, that even the House of Lords would now be slow to disturb the accepted interpretation; but for that very reason I think that the prevailing interpretation must be regarded critically, if the true meaning of the original words, when the Act was first passed, is to be sought. In this context, it is relevant to recall what LORD FINLAY, L.C., said in *Morris v. Baron & Co* (18), on a similar question, the difference of wording between sect. 17 and sect. 4 of the Statute of Frauds; and between sect. 17 of that statute and the substituted words of the Sale of Goods Act, 1893, s. 4. LORD FINLAY, L.C., was not ignoring what LORD BLACKBURN had said in *Maddison v. Alderson* (19), at pp. 488, 489, but nevertheless was still of opinion in 1918 that the words of sect. 17 did make the contract invalid; and if he was right, the history of that section in our courts is a good illustration of how a true original meaning may become obscured in the course of time by an erroneous customary interpretation, accepted, and even in the end confirmed judicially, so that it becomes, as LORD BLACKBURN said, "*communis error* and makes the law." We are not concerned in this case to pursue the point raised by LORD FINLAY, L.C., any more. I refer to it only for the purpose of further discounting the value which attaches to the habit of citing other statutes in order to construe the one calling for interpretation.

The fundamental distinction of the various enactments cited as similar

is that there is nothing in the enactment we have to consider to indicate that it is intended for the benefit of anybody. To whom could the maxim I have quoted have been held to apply? Who were the benefited persons who could renounce their benefit? Consider the contrast afforded by the Public Authorities Protection Act. Parliament made it clear there that the Act was for the benefit of a particular class, both the short title and the long title call it an "Act for the protection of public authorities." Parliament thus emphasised their protection as the dominant purpose of the Act, and created for public authorities a privileged position of which the beneficiaries could avail themselves or not as they liked, a position to which the maxim is directly applicable. A

The respondents relied also on the analogy of the old sect. 17 of the Statute of Frauds. I have already indicated one reason for rejecting that analogy, the doubt expressed by LORD FINLAY, L.C., as to the original meaning of the words of sect. 17. Another difference is that the Act was dealing not with claims, but with the form and proof of the contract, the purpose being to protect a particular class of person, viz., purchasers, from frauds. B

Reliance was also placed upon *Griffiths v. Dudley (Earl)* (14), a case upon the Employers' Liability Act, 1880, s. 1, where it was held by a divisional court that the statutory exclusion of the common law doctrine of common employment from employers and workmen contracts did not prevent the parties contracting out of the Act. It was not an enactment to forbid claims; it was an enactment to confer a benefit on a particular class, by taking away a particular defence against claims. C The decision is not *in pari materia* with a statute which, on the one hand, says claims are not to be allowed, and, on the other, does not purport to confer a benefit on any particular class. In the result, I agree with the views of SLESSER, L.J.; I do not think that any one of the statutes, on the similarity of which the respondents rely, is really analogous; the cases cited, therefore, cannot help, and we have to make up our minds on the effect of the words used in this statute. D

On that question, it is my opinion that the words of sect. 39 of the Act of 1853, repeated in sect. 484 of the consolidating Act of 1854 and sect. 557 of the similar Act of 1894, are capable of only one interpretation: E I think they constitute an express prohibition of all salvage claims falling within their ambit, and I feel bound so to hold, although in view of the judgment of GREER, L.J., I do so with diffidence. However, even if the words are not quite so clear as I think them, and leave any ambiguity, there are certain considerations which seem to me to support an identical interpretation. F If a statute dealing with a general question of law contains any ambiguity, it is essential to see what the state of the law was when it was passed. Let us apply that rule to the Act of 1853. Salvage remuneration appears originally to have been given by the G H

Court of Admiralty in this country as a reward to individual salvors, officers, and crew and others for personal services, successfully rendered by them at their personal risk, to maritime property, i.e., ship, cargo, or freight, in danger either from enemies (including pirates) or from perils of the sea; the former being known as a military salvage and the latter as a civil salvage. This is the primary sense of salvage: see *The Thetis* (2), per SIR CHRISTOPHER ROBINSON, at p. 48:

Salvage, in its simple character, is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, and with a lien for their reward. It is personal in its primary character, at least; and those who are so employed in the service are those whom the law considers as standing in the first degree of relation to the property and to the proprietors.

It was only at a later stage, some time after our courts had first admitted the general right of personal salvors, that the risk incurred by the owners of a salvor ship used as an instrument in the salvage service came to be recognised as a separate ground for remuneration entitling its owners to claim. It was as an exception to the general rule that the owner's claim was admitted: see per LORD STOWELL in *The Vine* (20) at pp. 1, 2:

The claim of Lieut. Porter is quite novel. It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remuneration. The exception to this rule that not unfrequently occurs is in favour of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed.

It is not necessary for the purpose of this judgment to ascertain when this extension was first allowed by the court, but the invention of steam made the steam vessel so efficient an instrument of salvage that its use soon caused the court to give emphatic recognition to the owner's rights as salvors: see a case in 1824, *The Raikes* (21), where LORD STOWELL referred to them, at p. 246:

This is a case of salvage service performed by the "Monarch" steam-packet; and it is the first case in which a compensation has been claimed, in this court, for the services of a vessel of this peculiar character: I am, therefore, inclined to give as much encouragement as possible to similar exertions, on account of the great skill and the great power of vessels of this description.

In 1857 DR. LUSHINGTON, in *The Spirit of the Age* (22), said, at pp. 286, 287:

We all know that formerly claims of owners of vessels to participate in salvages did not receive very favourable attention from the judges who preceded me in this chair; but since then things are much changed; steamers are able to render important salvage services, in which the ship herself is the chief agent. I have therefore departed from the former practice, and have given adequate rewards to the owners of such vessels.

It is unnecessary to refer in further detail to the cases upon the grounds for remunerating the owners of salvor vessels; the history of the law is sufficiently stated in KENNEDY, 3rd Edn., ch. 4, and particularly pp. 81-85. But this enlargement of the scope of salvage remuneration

does not seem, as far as I have been able to trace, ever to have been judicially extended to the King's ships—at least to the extent of allowing the Admiralty or the Crown to claim as salvors in ordinary cases of salvage by the King's ships. The first approach to such an extension which I have been able to find was in 1833, in *The Thetis* (2), to which I have already referred. That was a wholly exceptional salvage. H.M.S. "Thetis," a frigate of 46 guns, had sunk in a rocky cove on the Brazilian coast with a treasure of 810,000 dollars on board. Extraordinary salvage services, mostly from the land, and lasting over 18 months, were rendered by the admiral in charge of the station, and by a Captain Dickinson and others nominated by him for the work; in addition, plant and apparatus of what was then a novel and ingenious kind were specially made, funds being found by the Admiralty for the purpose. In the end 750,000 dollars were recovered. SIR CHRISTOPHER ROBINSON made various awards to the salvors for personal services. There was in addition a claim by the Admiralty itself of £13,833 for the expenses to which they had been put, but there was no adjudication upon the legal justification of this claim, as the owners of the treasure and the admiral as salvor both assented to its being met out of the salvaged dollars; so that to that extent there was no dispute about the Admiralty's right. In addition it must be remembered that the nature of the service was very unusual. SIR CHRISTOPHER ROBINSON said of it, at pp. 61, 62:

The claim on the part of the Admiralty for the wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors; and it is said to be unprecedented; but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs, in cases of private salvors; and such claims have constantly been allowed. The claim is more novel in form than in principle, and new classes of cases may be expected to require new rules. The Lords of the Admiralty are but trustees for the public, in regulating the employment of H.M. ships; and they must act as they think proper in regard to the terms on which they may be permitted to engage in such services as these. There is, undoubtedly, a difference between the assistance afforded in ordinary cases, by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and stores, to a service of this kind, for 18 months together. I am, however, not called upon to give any opinion on this claim, as it is not opposed, but admitted, on the part of the owners and of the admiral; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service.

The observation of the learned judge that such a claim had not hitherto been allowed "in ordinary cases" will be noted.

Again, in *The Ewell Grove* (4), a vessel, stranded hard on a rocky shelf off Jamaica, in a position of great danger, was rescued by H.M.S. "Rhadamanthus," a steam vessel. SIR JOHN NICHOLL, at pp. 224, 225, pointed out the similarity of circumstances in the use of a King's ship and in the ordinary case of a private owner. But the salvors claiming were not the Admiralty, but the captain and crew of the King's ship, and SIR JOHN NICHOLL only referred to a possibility of the Admiralty asking

- the salvors for part of their award. The fact that in ordinary cases an exception had been made in favour of private owners, but that this privilege had not been definitely extended to the Crown for the use of King's ships, is the more significant, in that it would seem just as logical
- A to extend the benefits of the law of salvage remuneration so as to give the Crown some reward for the risks run by its property, as it had been to extend it so as to give the owners of private salvor ships a reward for the risks run by their property. So much are the two on a parity that I cannot help thinking that the real reason why the right of the
- B Crown was not frankly recognised must have been some view then taken of public policy—possibly that it was a wrong principle to allow the Crown to claim, because the Crown was already under a moral duty to all its subjects to assist them in distress at sea, and therefore ought not to seek a reward when using public ships to discharge a public duty.
- C But it is not for the court now to speculate as to what the reason was ; it is enough to record the fact that in 1853 when the relevant statute was passed, the state of the law appears to have been that the question of remuneration to the Admiralty for the use of the King's ships and other matters mentioned in the statute had not been the subject of direct
- D judicial decision, although it had been indirectly considered from time to time.

In the argument before us it was contended that in some of the cases in the first half of the nineteenth century the court intended to express an opinion which, although *obiter*, was entitled to respect, to the effect

E that a claim by the ship itself, i.e., by the Crown or Admiralty, was cognisable, and that reward might in that capacity be given to the owners of the King's ship. I do not think this was ever intended by our Admiralty judges. A good illustration of the misconception is afforded by the passage in the judgment of DR. LUSHINGTON, in the year 1844,

F in the case of *The Iodine* (7) at p. 141, which was actually cited by BANKES, L.J., in *The Sarpen* (8) at p. 320. The passage to which I refer is :

G That where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked.

The second sentence was quoted to us (and apparently also to the court in *The Sarpen* (8)) as intended to refer to claims on behalf of the Crown,

H or the Admiralty, in respect of the services rendered by a King's ship. I do not think this is the correct interpretation of the sentence ; in my view it meant simply that in a suit for salvage remuneration on behalf of officers and seamen of one of His Majesty's ships, although, so far as concerned their claims for their personal services, the claimants were

on the same advantageous footing as persons not in His Majesty's service, yet their remuneration must be limited to the value of their personal services without any reference to the risks caused to His Majesty's ships, and other property in the course of salvage services, just because the claimants did not own them—with the consequential corollary that the total remuneration to be paid out of the salvaged property would always for that reason be less than if the salvors had been private owners: see KENNEDY, 3rd Edn., pp. 124, 125. A

In examining to-day the language used by the earlier Admiralty judges, it is important to keep in mind the inveterate habit of personifying the ship, as being itself the plaintiff or defendant in Admiralty suits, including salvage cases. Time after time Admiralty judges are reported as speaking of the ship as making the claim, in cases where the salvage had been effected by a King's or Queen's ship, but the only claimants before the court were the officers and crew. It never seems to have entered anyone's head in those days that the Crown or the Lords Commissioners of the Admiralty were being referred to, or that they were or could be plaintiffs suing in the capacity of owners of the ship which had incurred risk or suffered damage in effecting the successful salvage. Illustrations of this source of ambiguity are to be found in two or three cases cited to us by counsel, and particularly in *The Iodine* (7), cited by BANKES, L.J., in *The Sarpen* (8), to which I have already referred. See, for instance, *The Louisa* (23) at pp. 318, 319, where LORD STOWELL, then SIR WILLIAM SCOTT, said in regard to the salvage of a recaptured ship which was in a sinking condition: B C D E

The ship must be taken to have been in a state of considerable danger from her own condition; and though it is certainly the duty of King's ships to afford assistance to all His Majesty's subjects whom they may meet with in distress, yet I do not know that it is incumbent upon them, at the hazard perhaps of their lives, and without any prospect of reward, to take charge of a ship in a sinking state. Any hesitation in affording assistance might be of dangerous consequence to the property of persons so circumstanced; and it is therefore proper, for the encouragement of prompt and signal exertions, on the part of the King's officers and men, to hold out to them the prospect of reward. . . . The captain of a man-of-war is not bound to put himself or his men in danger to preserve a merchant ship from sinking; and I do not know that he is bound to take her in tow. He did so, in this instance for as long a time as any assistance of that kind was required; and although the service which has been performed is not of the highest degree of merit, it is not to be too lightly estimated. F G

It is to be noted that the case is reported under a headnote saying "Civil salvage is due to a King's ship for services rendered to a vessel in distress," but the only claim before the court was by officers and crew. Similar observations apply to *The Mary Ann* (1), where the commander and crew of H.M. sloop "Arab" were given salvage, and LORD STOWELL said, H at p. 158:

In this case a demand is made for the remuneration of salvage services, which have been meritoriously effected by the commander and crew of H.M. sloop "Arab"; and, undoubtedly, the parties may fairly claim a remuneration, although the ship belongs to the state, and although there is an obligation upon King's ships to

assist the merchant vessels of this country ; yet, when services have been rendered, those who confer them are entitled to an adequate reward.

The examination of the old cases seems to show that it was common form in the Admiralty Court that it was only the officers and men who were entitled to claim, at any rate in respect of remuneration proper, for the services of the ship. Nor have I found any case, with the doubtful exception of *The Thetis* (2), in which loss or damage to government stores, or indeed any expenses incurred by the Crown, were allowed as salvage. Nor have I found any case of an agreement for such payments being enforced by the Admiralty, either as salvage or at all. It is true that in the case of *The Lustre* (3), there was reference to what is there called an "express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or damaged"; but there again the claimants were the officers and men of the King's ship; and in addition there was no adjudication on the question of the agreement. The position, therefore, when the Act of 1853 was passed may, I think, be summarised by saying that no practitioner in the court imagined that a legally enforceable claim could be put forward by the Crown for salvage remuneration due to it as owner in respect of a Queen's ship used in the salvage service. What, then, was the object of the Act? It may have been merely declaratory. Possibly it may be a more natural inference that, as there had been signs of attempts by the Admiralty to make claims—such as that in *The Lustre* (3)—Parliament thought it good public policy to forbid such claims in clear terms. Possibly some question may have arisen with a foreign government through the Admiralty trying to recover salvage from a foreign ship.

In the result, I feel forced to the conclusion that Parliament had deliberately taken the position in hand, and then decided to clear up doubts by declaring that no such claims were to be allowed in the future. One thing at any rate is clear: it cannot be said that Parliament was by the new law conferring any particular benefit upon the owners of ships, freights and cargoes in maritime peril as a class. Taking everything into account, there seems to me to be sufficient reason to resolve any doubt, which there may be (and I see none), in favour of the construction of the words "no claims shall be allowed" as meaning "all such claims are forbidden."

It is curiously interesting that we have the report of a case which came before DR. LUSHINGTON within three months of the Act of 1853 coming into force (which was Oct. 1, see sect. 3 of the Act), where he expressed his understanding of the new Act. *The Rosalie* (24) (heard on Dec. 20, 1853), was a salvage case where the claimants were the officers and crew of a Queen's ship, and DR. LUSHINGTON said this, at p. 189:

Before I advert to the particular facts and circumstances of this case, I will

observe that I do certainly rejoice the ancient law and practice of this court has not been altered. Whatever may be the merits or demerits in this particular instance I think that, continuing to allow Her Majesty's officers and those under their command, to obtain a reward where they do render beneficial services, frequently at great risk and peril, and sometimes where the commander incurs great responsibility, is not merely an act of justice, but most advantageous to the mercantile marine of this country. . . . The parties promoting this suit are Lieut. Day, and those on board the "Locust." Of course he could make no claim for the service of the steamer herself—she is the property of the Government; and though he would be responsible for any damage which improperly occurred, he would be answerable for nothing else. It is impossible for him to advance any demand at all like that of the owners of steam or other vessels who have risked their property in order to render assistance to others.

It will be observed that, in the first passage quoted, DR. LUSHINGTON says in terms that the ancient law and practice of the court have not been altered by the recent Act. In the second passage he points out that the service of the Queen's ship in itself, being the property of the Government, cannot enter into the consideration of the officer's claim for remuneration of himself, except in so far as, being responsible for damage to the vessel through his own negligence, he may have incurred a personal risk in that respect. This second sentence serves to reinforce the view I have expressed as to the true meaning of the passage in *The Iodine* (7), quoted by BANKES, L.J.; it also shows that BANKES, L.J., used the word "restricting" in that passage inaccurately; and consequently that BRANSON, J., was in error in relying upon his construction of it.

There is still one more reason for construing sect. 557 as a prohibition of claims within its ambit on general grounds of public policy, and not as a grant of optional defence to defendants. It seems to me that the Act of 1916 read in its natural sense assumed that sect. 557 prohibited claims by the Admiralty, that it is because Parliament took that view of the law that it decided, perhaps in the interest of British merchant shipping during the War, to rescind the prohibition to a partial extent, viz., for His Majesty's specially-equipped salvage vessels and tugs. The judgment of SIR SAMUEL EVANS, P., in *The Matti* (9), at p. 319, seems to support that view.

For these various reasons, I have arrived at the conclusion in answer to my question (iii) that, even if there is any ambiguity in sect. 557, the crucial words in it ought to be construed as a prohibition. If so, the Admiralty could not make a contract to defeat the Act, and whether my view upon question (i) is right or wrong, I agree in the conclusion reached by SLESSER, L.J., that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *William A. Crump & Son* (for the appellants); *Treasury Solicitor* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

BARKER v. ALLANSON.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), **November 23, 24, December 18, 1936.**]

A *Practice — Parties — Representation order — Unincorporated association — Fluctuating membership—Action for goods supplied—R.S.C., Ord. 16, r. 9.*

In an action commenced in 1936 for goods supplied in 1921 to an unincorporated association, the plaintiff issued a writ against four members of the association on behalf of the association, and he obtained an order under R.S.C., Ord. 16, r. 9, that the four defendants should be sued as representing all the members of the association. The membership of the association fluctuated considerably and, at the time of the issue of the writ, of 841 members only 19 were members at the time when the goods were ordered. Some of the members were infants who had no voting power in the association :—

HELD : as only the members who were members at the time the goods were ordered could be liable, and some of those members might have a defence under the Statute of Limitations, there would be various defences open to different members of the association, and there was, therefore, no common interest within R.S.C., Ord. 16, r. 9, and the representation order ought not to have been made.

[**EDITORIAL NOTE.** It is said that the meaning of R.S.C., Ord. 16, r. 9, as regards defendants is not clear. After the present decision it would seem to be clear that a representation order cannot be made in the case of a claim in respect of goods sold and delivered where all the members of the unincorporated body are not liable. In the present case the decision can also be supported upon the fact that some of the members might have pleaded the Statute of Limitations, whilst to others a defence of infancy was open ; but the first proposition seems to be clear.

AS TO REPRESENTATION ORDERS, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 103, 104, para. 182 ; and FOR CASES, see DIGEST, Practice, pp. 420, 421, Nos. 1165-1171. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 207-211.]

Cases referred to :

- (1) *London Asscn. for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A.C. 15 ; Digest, Practice, 420, 1166.
- (2) *Ideal Films, Ltd. v. Richards*, [1927] 1 K.B. 374 ; Digest, Practice, 267, 45.
- (3) *Walker v. Sur*, [1914] 2 K.B. 930 ; Digest, Practice, 420, 1165.
- (4) *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900), [1901] A.C. 426 ; 43 Digest 92, 957.
- (5) *Tredwen v. Bourne* (1840), 6 M. & W. 461 ; 10 Digest 1099, 7710.
- (6) *Hawken v. Bourne* (1841), 8 M. & W. 703 ; 10 Digest 1100, 7711.
- (7) *Wood v. McCarthy*, [1893] 1 Q.B. 775 ; 43 Digest 126, 1286.
- (8) *Hardie & Lane, Ltd. v. Chiltern*, [1928] 1 K.B. 663 ; Digest Supp.
- (9) *Mercantile Marine Service Asscn. v. Toms*, [1916] 2 K.B. 243 ; 43 Digest 126, 1288.
- (10) *Mabro v. Eagle Star & British Dominions Insurance Co., Ltd.*, [1932] 1 K.B. 485 ; Digest, Practice, 405, 1067.

APPEAL from an order of GREAVES-LORD, J., dated Nov. 12, 1936.

The plaintiff started an action against the defendants, who were the chairman, treasurer, financial secretary, and general secretary of the Chilton Collieries Lodge of the Durham Miners' Association, an un-

incorporated association. On Aug. 20, 1936, the district registrar made an order that the defendants named in the writ should be sued as representing all the members of the Lodge. The plaintiff's claim was for the balance of the price of goods sold and delivered to members of the Lodge upon the orders of the said Lodge. The defendants applied to the registrar to have the representation order set aside. The registrar refused, and the defendants appealed to GREAVES-LORD, J., who reversed the decision of the registrar and ordered (i) that the writ and the service thereof be set aside; (ii) that the representation order and the service thereof be set aside; and (iii) that all subsequent proceedings be set aside for irregularity. The plaintiff appealed. A
B

J. Charlesworth, for the appellant: Where a plaintiff has sold goods to an unincorporated association, he can either sue the individuals of the association personally, or he can sue against the funds of the association. Such an action can be maintained with the aid of a representation order; it is unnecessary to join the trustees of the association. It is submitted that one can get a declaration against an unincorporated association. The question is, have all the members the same interest; it is submitted that they have. It is said that the membership is always changing and that some of the present members were not members when the debts were incurred; however, the plaintiff is not asking for judgment against the members, but against the funds of the association, in which all the members have a common interest. In *Walker v. Sur* (3) the error was not that the trustees were not joined, but that the action was framed so that execution would issue against the members individually. Here we have four executive officers as defendants, and they can properly represent the Lodge. Unless there is a representation order, the association is not before the court, and the plaintiff can get no redress. A representation order is a question of law, not a matter of discretion. [Counsel referred to *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (1900) (4), *Tredwen v. Bourne* (5), *Hawken v. Bourne* (6), *Wood v. McCarthy* (7), *Ideal Films Ltd. v. Richards* (2), and *Hardie & Lane, Ltd. v. Chiltern* (8).] C
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E
F

G. Norman Black, for the respondents: For a representation order to be granted, it is a condition precedent that there should be numerous persons having the same interest in a cause or matter. Here there are five classes of persons: (i) those who received the goods; they have no defence; (ii) the officers of the association who were parties to the orders; they also have no defence; (iii) the members at the time the goods were ordered; they are only liable if they authorised the orders; (iv) those who were infants at the time the goods were ordered, or who are infants now; they have no power of voting; (v) those who have joined the association since the goods were ordered and supplied; they constitute the majority of the members. A new member joining now G
H

cannot be made responsible for goods supplied in 1921. It is a matter of discretion for the judge whether a representation order be given. [Counsel referred to *London Asscn. for Protection of Trade v. Greenlands, Ltd.* (1), *Mercantile Marine Service Asscn. v. Toms* (9), and *Mabro v. Eagle Star & British Dominions Insurance Co., Ltd.* (10).]

Charlesworth, in reply: The fact that there may be five classes of defendants is only relevant in an action against the members personally; here it is against the funds of the lodge. The credit was not given to any individual member but to the lodge.

GREER, L.J.: On Aug. 12, 1936, the plaintiff issued a writ against John Robert Allanson, John Henry Tate, Lawrence Edmond Raine, and James Keenan (on behalf of the Chilton Colliery Lodge of the Durham Miners' Association). On Aug. 24, the writ was served on the defendant John Robert Allanson, on the defendant John Henry Tate on Aug. 27, on the defendant Lawrence Edmond Raine on Aug. 28, and on the defendant James Keenan on Aug. 27. The Chilton Colliery Lodge is not an incorporated society, nor is it a trading partnership. It is not a legal *persona*; as used in the statement of claim, "the Chilton Colliery Lodge" must be treated as meaning all the members of the Lodge at the date of the issue of the writ. On Aug. 20, the High Court district registrar, on the plaintiff's application, made an order under R.S.C., Ord. 16, r. 9, that the defendants named in the writ should be sued as representing all the members of the Lodge. If the order of the registrar was lawfully made within the provisions of the rule, all the persons who were members of the Lodge at the date of the issue of the writ became defendants to the action to the same extent and with the same consequences as if they had been named defendants in the writ. As there were 841 members of the Lodge, it would have been impracticable and highly inconvenient to require that the plaintiff should name all of them defendants to the writ. The defendants entered a conditional appearance to the writ, and then applied to the registrar to set aside the representation order. R.S.C., Ord. 16, r. 9, is in the words following:

Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

At the date of the registrar's order, the writ was endorsed as follows:

The plaintiff's claim is against the defendants as representing the general body of the members of the Chilton Colliery Lodge of the Durham Miners' Association for £135 18s., the balance of the price of goods sold and delivered to various members of the said Lodge at the request and to the order of the said Lodge.

When the defendants applied to set aside the representation order, the statement of claim indorsed on the writ was amended as appears in red ink. No question is raised in this appeal as to the validity of the

amendment made at the suggestion of the registrar. Of the 841 persons who were members of the Lodge at the date of the writ, only 19 were members at the time the goods supplied by the plaintiff were ordered in 1921. The orders for the goods were in the following or similar words :

692.

CHILTON MINERS' LODGE.

No.

10.6.1921.

Please supply bearer Mr. A. Robson with $\frac{\text{groceries}}{\text{meat}}$ to the value of pound
five shillings.

This ticket is invalid unless embossed with Lodge stamp.

THOS. E. BARRON & T. BELLAS,

£ : 5s. : d.

Secretaries.

It is indisputable that only the persons who, as members of the Lodge, had authorised the order given by the secretaries in 1921, could be made liable in an action for goods sold and delivered. The plaintiff's case, as appears from his affidavit in opposition to the defendants' application, and from the particulars to the statement of claim, was that he could treat the existing members of the Lodge as liable for the unpaid balance of goods ordered in 1921. Para. 2 of the plaintiff's affidavit makes it quite clear that his claim was for the balance of the price of goods sold and delivered to the several members of the Lodge on the orders given by the secretaries of the Lodge in 1921, i.e., on the credit of the persons who were then members of the Lodge. This paragraph reads as follows :

The goods referred to in the statement of claim endorsed on the writ were supplied by me at the request and to the order of the Chilton Colliery Lodge. I gave credit to the said Lodge and not to any individual member thereof. Most of the persons to whom goods were supplied were quite unknown to me and I would not have supplied them with goods without the order of the said Lodge. A copy of the form of order on which I supplied the said goods is now produced to me marked "A."

The registrar refused to discharge the representation order. The defendants appealed to the judge in chambers, who reversed the decision of the registrar and ordered (i) that the writ of summons and the service thereof be set aside, (ii) that the representation order and the service thereof be set aside, and (iii) that all subsequent proceedings be set aside for irregularity, with costs to be paid by the plaintiff to the defendants. The plaintiff now appeals from the judge's order. I am satisfied that the judge's order, in so far as he ordered the representation order to be set aside, is right and ought not to be reversed. I am not quite satisfied that the judge was right in setting aside the writ and subsequent proceedings. The defendant Tate was a member and treasurer of the Lodge at the date when the goods were ordered by the secretaries on behalf of the then members of the Lodge, and he might be proved at the trial to be one of those who authorised the giving of the orders in 1921 and the subsequent payments on account. The plaintiff may be able to prove this at the trial and get, for what it is worth, a judgment against

the defendant Tate. But no point of this kind was made by Mr. Charlesworth, who argued the case on behalf of the appellants. The only ground on which he argued that the appeal should be allowed was that the representation order was right. He seems to have conceded that if the judge was right in setting aside the representation order he could not and did not complain about the rest of the judge's order. In these circumstances, I do not think we are entitled to set aside the consequential order made by the learned judge on the ground above indicated, as we have heard no argument on the question. I read the statement of claim indorsed on the writ as a claim for two declarations, (i) that the present members of the Lodge, i.e., the 841 individuals who were by representation made defendants to the action by the registrar's order, are liable to pay the sum of £135 18s. as the balance of the price of goods ordered by the 1921 secretaries on their behalf and with their authority, and (ii) a declaration that the defendants are entitled to resort to the funds of the Lodge, i.e., the funds of the 841 members, for payment of the sum so claimed to be due from these members. It is plain that all the defendants by representation have not the same interest in the cause. The majority of these defendants would, if they had been named as defendants, have been entitled to prove that the goods were not ordered by them or with their authority, as they were not members of the Lodge in 1921, others might have been able successfully to plead the Statute of Limitations by proving that they had no part or lot in the payments that were made from time to time, while others might have no answer to the claim. The present case is one to which the law as laid down by LORD PARKER OF WADDINGTON in his speech in the *London Assn. for Protection of Trade v. Greenlands, Ltd.* (1), at p. 39, is certainly applicable :

In other words, there might be separate defences open to some members of the association and not to others, and if this were so there would be no common interest within the rule. Moreover, when the appearance was entered Shand Kydd was a member of the association, and, he being the person to whom the communication complained of was made, might very well contend that he could not be held liable for a communication made to himself. Lastly, if an order could have been made at all it must have been confined to authorising Sir Samuel Scott to defend on behalf of himself and those who were members of the association at the date of the alleged libel. Those who had become members since that date could not be liable at all.

It was contended for the appellants that the decision of the Court of Appeal in *Ideal Films, Ltd. v. Richards* (2) was a parallel case to the present, and an authority for the proposition that the registrar's order was right. There is nothing in the facts as pleaded in that case inconsistent with the defendants by representation having all been members of the unincorporated society at the time the films were supplied. It was not suggested by the respondents' counsel that the defendants by representation were not members at the time the films were ordered, or that any of them had defences different from the others. I understand

the case as deciding that if all the proposed defendants by representation are proved to be liable to pay a debt to the plaintiffs, a further order may be made directing trustees of the funds of those defendants (who *ex hypothesi* have a common interest in defending the action), to pay the amount of the defendants' debt out of the property and assets of the defendants. In my opinion, the decision has no bearing on the question we have to determine, except in so far as it assists the respondents in their contention that, before an order can be made for payment out of the funds of the unincorporated society, there must be a finding that the debt is due from the members of the society. A

For the reasons above stated, I am of opinion that the appeal should be dismissed with costs. B

SCOTT, L.J. : I agree with the judgment of GREER, L.J., which I have read and considered. Before deciding in any particular case whether a representation order under R.S.C., Ord. 16, r. 9, should be made in regard to defendants, it is necessary to consider two questions, (i) what is the cause of action, and (ii) what is the precise class of potential defendants who are to be represented by the defendants on the record for the purpose of imposing liability on them if judgment is given for the plaintiff. The vital thing to remember is that judgment against representative defendants means judgment against each individual person covered by the representation. It is because of this consequence of a representative judgment that the conditions upon which an order to represent may be made are those laid down by LORD PARKER in the passage from his opinion in *London Asscn. for Protection of Trade v. Greenlands, Ltd.* (1), which GREER, L.J., has quoted. The reason why the position of all represented defendants must be the same as that of those who represent them is simply because that is the hypothesis on which alone such an order is authorised by the rule. The rule is not a device for enabling a plaintiff to have an inquiry conducted by the court for the purpose of drawing up a list of persons who may, or may not, be liable to him in respect of the cause of action alleged on the writ, and then deciding whether they are liable or not. Its purpose is strictly confined within the limits I have stated. D E F G

In the present case the form of relief claimed is a declaration, but the cause of action, on which the court would base its declaration, is a claim for the price of goods sold and delivered to the various members of the Lodge who in the year 1921 received and consumed the goods. Construed on the principles I have stated, the representation order made was accordingly one which enabled the plaintiff through the named representatives to sue all the individual members who had authorised the purchase of the goods supplied, and to get a judgment enforceable against them—so far as the word enforceable is applicable to a declaratory H

judgment. Unless all the persons so to be represented by the named defendants stood in the same position *vis-à-vis* the plaintiff as the named defendants, they would not be really "represented" by them, and therefore could not come within the meaning of the rule. It follows

- A necessarily, for the reasons stated by GREER, L.J., that the representation order as made was limited in its application to those individuals who were still members of the Lodge at the date when the writ was issued, and also had been members in 1921, and then as members could have authorised the ordering of the particular lots of the goods in question.
- B For the purposes of our decision it is enough to say that when the representation order was made, there were 841 members of the Chilton Colliery Lodge, but the majority of these had joined since 1921 and consequently had had nothing to do with the ordering of any of the plaintiff's goods at that time. In 1921 there were 1093 members, but only 89 of these
- C received goods from the plaintiff—of these 89 some had died, some had ceased to be members, some had paid for their goods; and only 19 out of the members in 1921 were still members at the date of writ issued. Even amongst these there may have been legal differences of position in regard to the Statute of Limitations, and the like. The result, in my
- D opinion, is that there was so little identity of position as between the representing and the represented defendants, that I do not think there was any ground for a representation order at all: *a fortiori* we could not interfere with the discretion of the learned judge.

- E I think it is perhaps desirable to add that we are not prejudging a wholly different type of case which may conceivably arise some day in the event of a trade union or friendly society or a club having a rule which: (a) authorises the distribution of goods by way of assistance in kind, and (b) treats the cash cost of supplying the goods as a charge upon the general fund of the changing body of members. If the rules
- F of the Durham Miners' Association had contained a rule authorising the officers of the Lodge in their discretion, instead of granting money allowances to the members, to purchase equivalent amounts of goods and give assistance in kind to the members, with a further provision that the cost of paying for the goods should be a charge on the Lodge funds
- G and defrayed by the members for the time being when money was wanted for such payments, irrespective of the question whether they had been members or not at the time when the goods were bought, different considerations would be present. That question, however, does not arise in this appeal, because there is no such cause of action alleged in
- H the statement of claim, nor for that matter is there any rule, at any rate in express terms, having any such effect; and I express no final opinion upon that hypothetical case.

GREER, L.J.: EVE, J., has not thought it necessary to write a

judgment, but he agrees with the judgments that have been delivered by the other members.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Sayer, Ledgard & Smith*, agents for *Thos. Jennings & Haggie*, Bishop Auckland (for the appellant); *T. D. Jones & Co.*, agents for *Ronald W. Williams*, Durham (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re THE COAL MINES ACT, 1930. *Re* THE FOREST OF DEAN DISTRICT (COAL MINES) SCHEME, 1930. CANNOP COLLIERY CO., LTD. *v.* EXECUTIVE BOARD.

[CHANCERY DIVISION (Crossman, J.), December 21, 1936.]

Mines—Coal mines—Regulation of production—Scheme—Annual basic tonnage—Equitable addition or deduction—“Trade of the mine.”

By the Forest of Dean District (Coal Mines) Scheme, 1930, the annual basic tonnage of a mine was to be the mean of the tonnages of coal supplied during 1934 and 1935 from that mine, provided that in any case where the board considered that the basic tonnage so calculated did not fairly represent the trade of the mine they might make such special addition or deduction as is fair and equitable:—

HELD: the words in the proviso “fairly represent the trade of the mine” referred to the trade in the years 1934 and 1935 and not to the trade of the mine at the time of the determination of the annual basic tonnage.

[EDITORIAL NOTE.] This case is purely the construction of a particular scheme, but as such schemes have many features in common and concern a large and important industry it is here included.

AS TO SCHEMES REGULATING PRODUCTION, SUPPLY AND SALE OF COAL, see HALSBURY, Hailsham Edn., Vol. 22, pp. 719-734, paras. 1529-1536; and FOR THE COAL MINES ACT, 1930, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, pp. 371-391.]

AWARD in the form of a special case stated for the opinion of the court.

Fergus D. Morton, K.C., and *D. Ll. Jenkins* for the appellants.

T. Elder Jones for the respondents, the executive board.

Sir Lynden Macassey, K.C., and *J. B. Herbert* for two other parties interested.

CROSSMAN, J.: On Oct. 23, 1926, Sir Russell James Kerr, the arbitrator, appointed under the Forest of Dean District (Coal Mines) Scheme, 1930, cl. 95 (1), incorporating amendments approved up to and including July 27, 1936 (which was approved by the Board of Trade pursuant to the powers conferred on them by the Coal Mines

Act, 1930, s. 1), in an arbitration under cl. 48 (5) of the Scheme as amended, stated his award in the form of a special case for the opinion of the court under the Arbitration Act, 1889, s. 7 (b), the question being whether, in determining the annual basic tonnage of a coal mine under cl. 48 of the scheme, the arbitrator is empowered by the second proviso to subcl. (1) of that clause to make such special addition as he thinks fair and equitable to the annual basic tonnage calculated by taking the mean of the tonnages supplied from that coal mine during the years 1934/35, if he considers that the annual basic tonnage so calculated does not fairly represent, at the date of the determination, the yearly rate at which the coal mine in question would then be selling and likely to continue to sell its coal, if the amendments to the scheme providing for the purchase and sale by the board of all coal supplied from the district had not been made.

C The material clauses of the scheme, as amended, are as follows :

48 (1) Before Aug. 1, 1936, the board shall determine the annual basic tonnage of every coal mine. Subject as hereinafter provided such annual basic tonnage shall be the mean of the tonnages of coal supplied during the years 1934 and 1935 from that coal mine, after deduction of the tonnages of coal supplied in those years for the purposes specified in the proviso to cl. 32 of the scheme: Provided that the board shall make a special addition in respect of any strike, lock-out, or accident which prevented or restricted the supply of coal in either of those years from that coal mine equal to the additional tonnage which, in the opinion of the board, would have been supplied from that coal mine but for that strike, lock-out, or accident: Provided further, that in any case where the board consider that the annual basic tonnage so calculated does not fairly represent the trade of any coal mine they may make such special addition or deduction as is fair and equitable.

E (2) The annual basic tonnages thus determined by the board or awarded upon arbitration as hereinafter provided shall come into operation upon Aug. 1, 1936, and shall remain in force without revision except in the manner hereinafter provided.

(3) If the operation of the Act be extended beyond Dec. 31, 1937, the board shall before Dec. 1, 1937, and subsequently before Dec. 1 in each year, make any revision of the annual basic tonnage of each coal mine required on the ground that the owner has persistently failed to supply such quantities of coal as the selling committee direct or has persistently requested the selling committee not to direct supply.

F (4) The annual basic tonnages determined by the board under the last preceding subclause or awarded upon arbitration as hereinafter provided, shall come into operation on Jan. 1, 1938, and subsequently on Jan. 1 in each year, and shall, subject to the provisions of the next following clause, remain in force without revision during that year.

G (5) Forthwith upon any determination of annual basic tonnages under this clause, the board shall send a notice of all such basic tonnages determined to each owner. If any owner refers any such determination to arbitration, notice of such reference shall forthwith be sent by the board to every owner. The annual basic tonnage of every coal mine shall thereupon be referred to arbitration and the arbitrator shall determine the annual basic tonnage of each coal mine.

H 32 On and after Aug. 1, 1936, no owner shall supply coal from his coal mine otherwise than to or to the order of the board: Provided that an owner may supply coal—(a) for use in working the coal mine; (b) free or at reduced rates for the use of persons who are or have been employed in or about the coal mine and the dependants of persons who have been so employed; and (c) for consumption in any excluded works of that owner as hereinafter defined.

51 (1) Within seven days of the date of the notice of any determination of the annual basic tonnage of his coal mine the owner may give notice in writing to the board specifying the proportion of such tonnage which he desires to be allocated to each quarter and subject to the approval of the board such allocation shall be the quarterly basic tonnages of that coal mine.

52 (1) Unless such supply is not reasonably practicable by reason of any strike, lock-out, or accident at his coal mine, or any other cause beyond the control of the owner, each owner shall load and despatch coal from his coal mine for supply to the board in accordance with the directions of the selling committee. Any owner who is unable so to load and despatch coal shall give immediate notice to the selling committee. (2) The board shall in each quarter so far as possible take coal from each owner in proportion to the quarterly basic tonnage of his coal mine for that quarter and the selling committee shall from time to time and as early as possible in each quarter inform each owner of the tonnage of coal which the board expect to take from him during that quarter. (3) Forthwith after the end of each quarter the selling committee shall determine the total tonnage of coal supplied to the board despatched from all the coal mines in that quarter. Such total tonnage shall be divided in the proportions of the quarterly basic tonnages of all the coal mines for that quarter and the tonnage thus calculated for each coal mine shall (subject to any addition under the following provisions) be the trade share of that coal mine for that quarter. A B

The rest of the clause provides for compensation or otherwise, in the event of the correct quantity not being supplied by a coal mine.

The executive board constituted under the scheme, acting under cl. 48 (1) of the scheme, on Aug. 28, 1936, determined the annual basic tonnage of the coal mine of Cannop Colliery Co., Ltd., to be 305,494 tons, which is the mean of the tonnages supplied during the years 1934 and 1935 from the Cannop Colliery Co., Ltd.'s, coal mine. The Cannop Colliery Co., Ltd., referred the matter to arbitration, and claimed under cl. 48 (1) that the annual basic tonnage so calculated did not fairly represent the trade of the coal mine. The arbitrator found that the coal supplied during the year 1934 amounted to 255,208 tons, and that the coal supplied during the year 1935 amounted to 355,781 tons, showing an increased supply for the year 1935 of 100,573 tons. The arbitrator also found that improvements had been effected in recent years by the Cannop Colliery Co., Ltd., and he stated that he saw no reason to doubt that the improvements so effected had a material bearing on the improved trade of 1935, and that this improvement continued up to the date of the determination by the executive board, figures being adduced to show that the sales for 1936, based on the results of the first six months' working, were likely to amount to 382,874 tons. C D E F

The Cannop Colliery Co., Ltd., claimed that the words of the second proviso to cl. 48 (1) of the scheme, as amended, applied, and that the annual basic tonnage calculated as the mean of the tonnage supplied during the two years 1934 and 1935 did not fairly represent the trade of the coal mine, and further that the trade must be taken to mean the trade at the date of the determination. G

The other owners contended that the expression "the trade" must be taken to mean the trade done within the years 1934 and 1935, and that the second proviso, cl. 48 (1), is intended to apply only where something has happened either inside or outside the coal mine which prevents the trade actually done being a true index or fairly representative of the trade of the coal mine during that period. The arbitrator ruled in favour of the latter contention. H

He held that, if he were right in so ruling, the case for the Cannop Colliery Co., Ltd., failed, as it was admitted that there was nothing abnormal in the years 1934 and 1935 which interfered with the trade, and in that case he determined the annual basic tonnage at 305,494 tons. He also held that, if he were wrong in his ruling, it might reasonably be said that the mean of the two years 1934 and 1935, amounting to 305,494 tons, did not fairly represent the trade of the coal mine at the time of the determination, and he was empowered, though not required, to give such addition to the coal mine as might be fair and equitable, and he said that he was of opinion that an addition should be given, and in the event of his ruling being wrong he determined the annual basic tonnage at 342,267 tons.

The question is, in my opinion, entirely one of construction of the scheme. Counsel for the other owners and for the executive board contended before me that the expression "the trade of any coal mine" in the second proviso to cl. 48 (1) must be read as meaning "the trade of any coal mine during the years 1934 and 1935." Counsel for the Cannop Colliery Co., Ltd., contended before me that there is no sufficient reason for so reading the expression. After listening to and carefully considering the very full and forceful arguments which have been addressed to me on this question, and studying with care the other material clauses of the scheme, I have come to the conclusion, and I hold, that upon the true construction of the scheme the meaning of the second proviso to cl. 48 (1) of the scheme is that, if the executive board, when they are determining the annual basic tonnage, consider that the annual basic tonnage as calculated under the main provision of the subclause, with any addition made under the first proviso, does not fairly represent the tonnage of coal being supplied at that time from the coal mine, they may, if they think fit, make such special addition to or deduction from the annual basic tonnage as so calculated as is fair and equitable, and I answer the question submitted by the arbitrator, amended as the parties have agreed to amend it, in the affirmative.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Colborne, Coulman & Lawrence*, Newport, Mon. (for the appellants); *Savage Cooper & Wright*, agents for *W. H. F. Barklam*, Cardiff (for the respondents, the executive board); *Lewis Lloyd & Co.*, agents for *Lloyd & Pratt*, Newport, Mon. (for the other parties interested).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS *v.* NEW SHARLSTON
COLLIERIES CO., LTD.[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **November 26,
December 18, 1936.**]*Income Tax—Mining lease—Right to let down surface—Easement—Finance
Act, 1934 (c. 32), s. 21.*

In a mining lease, certain rents were reserved as consideration for the right to let down the surface. In assessing the lessees to income tax under Sched. D, Case I, the commissioners refused relief in respect of these rents, contending that they were payments in respect of an easement within the Finance Act, 1934, s. 21 :—

HELD [ROMER, L.J., dissenting] : the rents were payments in respect of an easement within the Finance Act, 1934, s. 21, and could not be deducted in computing the amounts of the lessees' profits and gains to be charged.

EDITORIAL NOTE. The Court of Appeal have by a majority reversed the decision of LAWRENCE, J., and the law now is that the usual right to let down the surface of the land given in a mining lease is an easement within the definition of that word given in Finance Act, 1934, s. 21 (4) (b).

AS TO ASSESSMENT OF SURFACE DAMAGE PAYMENT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 140, 141, para 283 ; AND FOR CASES, see DIGEST, Vol. 28, p. 8, No. 28 and Supp. FOR THE FINANCE ACT, 1934, s. 21, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 342.]

Cases referred to :

- (1) *Elliott v. Burn*, [1935] A.C. 84, 18 Tax Cas. 595 ; Digest Supp.
- (2) *Fry v. Salisbury House Estate, Ltd.* ; *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432, 15 Tax Cas. 266 ; Digest Supp.
- (3) *Sitwell v. Londesborough (Earl)*, [1905] 1 Ch. 460 ; 19 Digest 25, 103.
- (4) *Rowbotham v. Wilson* (1860), 8 H.L. Cas. 348 ; 19 Digest 9, 8.
- (5) *New Sharlston Collieries Co., Ltd. v. Westmorland (Earl)* (1900), [1904] 2 Ch. 443, n ; 34 Digest 713, 982.
- (6) *Hill v. Gregory*, [1912] 2 K.B. 61 ; 28 Digest 8, 28.
- (7) *O'Grady v. Bullcroft Main Collieries, Ltd.*, *O'Grady v. Markham Main Colliery, Ltd.* (1932), 17 Tax Cas. 93 ; Digest Supp.
- (8) *Stewart v. Normanby Estate Co., Ltd.* (1933), 18 Tax Cas. 244 ; Digest Supp.

APPEAL from a judgment of LAWRENCE, J., delivered on Mar. 22, 1936, and reported in [1936] 1 All E.R. 802, confirming a decision of the special commissioners holding that the respondent company was entitled to relief from income tax under certain Sched. D assessments.

The respondent company held certain collieries under a lease dated June 24, 1865. A dispute arose between the company and the lessors concerning the right of support incident to the surface land. Litigation took place, and on Apr. 3, 1900, in *New Sharlston Collieries Co., Ltd. v. Westmorland (Earl)* (5), the House of Lords held that the lease did not operate as a surrender or assurance to the lessors of that right of support. On July 31, 1901, the company entered into a new agreement with the lessors, reciting that the company alleged that it was unable to work the

mines to the best advantage without letting down the surface and that under the indenture of June 24, 1865, it was not entitled to let down the surface, and containing a covenant by the company to pay £1,000 a year as rent and a further acreage rent of £7 10s., subject to undergettings; and it was agreed that the company should not be liable to compensate any person for mere depression or lowering of the surface not causing actual damage, but should be liable for damage to structures, etc. The company paid the £1,000 every year under deduction of income tax, but latterly the surface owner claimed that the company had no right to make that deduction. The company accordingly claimed that this sum should have been allowed as a deduction in computing its profits and gains for the purposes of assessment under Sched. D, Case I, for the years 1928/29 to 1933/34. The inland revenue commissioners disallowed the claim. At the hearing before the special commissioners on July 24, 1935, the company contended:

(1) That neither the indenture of June 24, 1865, nor the indenture of July 31, 1901, conferred any right on the company to withdraw support from the surface;

(2) That the indenture of July 31, 1901, gave the company no estate or interest in the surface lands;

(3) That the advantage of working its mines without hindrance from the surface owner was not an easement within the meaning of the Finance Act, 1934, s. 21;

(4) That the sum of £1,000 was a contractual payment made by the company for the right to work its own minerals in its own way free from any liability to an action for committing a nuisance;

(5) That the sum of £1,000 paid in each year was a proper deduction in computing the profits and gains of the company.

The commissioners of inland revenue contended:

(1) That the advantage enjoyed by the company under the indenture of 1901 was an easement within the meaning of the Finance Act, 1934, s. 21, and that the payments made in respect thereof were "rent" within the meaning of the said section, and therefore not an admissible deduction in computing the company's profits and gains for the purposes of assessment by reason of Sched. D, Cases I and II, r. 3 (l) or (m);

(2) Alternatively, that these payments were not an admissible deduction, because they were either capital expenditure or annual payments (the deduction of which is prohibited by Sched. D, Cases I and II, r. 3 (1)) or payments falling within Sched. A, No. III, r. 51.

It was, however, conceded that, having regard to the decisions in *Hill v. Gregory* (6), and *O'Grady v. Bullcroft Main Collieries, Ltd.* (7), this contention was not open before the commissioners, and no argument on this point was presented. The Crown maintained at the hearing that the indenture of 1901 conferred on the company the general right to let down the surface, and that in this respect the case differed from that of *Elliott v. Burn* (1).

The commissioners held that the right to claim damages in respect of buildings and other matters, which was expressly preserved by the indenture of 1901, could not exist if the right of support of the surface had been surrendered or extinguished. They considered that this provision was related to the similar provision in the indenture of 1865,

and was designed to limit claims by tenants and others in respect of nominal damage. They therefore held that the right conferred on the company was essentially of the same nature as that enjoyed by the mineral owners in *Elliott v. Burn* (1). The sole question before them was, they thought, whether the yearly sum of £1,000 fell within the Finance Act, 1934, s. 21. They considered that the advantage which the company enjoyed was a contractual one, and did not amount to an easement. The indenture of 1901, they said, conferred no estate or interest in the surface upon the company, and they held that the advantage of working its own property free from interruption was not a "right, privilege or benefit in, over or derived from land" within the meaning of the section; they also held that the sums payable annually under the indenture of 1901 were proper debit items in computing the company's profits for the purposes of income tax, and therefore that the company was entitled to relief under the Finance Act, 1923, s. 24. The Crown appealed, and the special commissioners stated a case.

LAWRENCE, J., held that the facts in *Elliott v. Burn* (1) were in no material respect different from the facts in the present case. The House of Lords, he said, had held that the right conferred by the agreement in that case was an incident of the land itself which had already suffered tax under Sched. A, No. I. It seemed to him that the Finance Act, 1924, s. 21, was not directed against profits arising from land the property in which had been separately assessed and charged, and he therefore read the words in sect. 2 (4) defining an easement as not covering property which had been separately assessed and charged. He accordingly held that the right to support in respect of which the payment was made was not an easement, and so he confirmed the decision of the special commissioners and dismissed the appeal.

The Crown appealed.

The Attorney-General (Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the appellants.

J. H. Bowe and *J. S. Scrimgeour* for the respondents.

The Attorney-General: These rents come under the plain words of the statute, and the question whether the words used would be appropriate to create an easement at common law is not material. The right here is a right to let down the surface, and damage done to buildings is not covered by the rent of £1,000 per year, but compensation has to be paid *pro rata*. Before the passing of the Finance Act, 1934, s. 21, the practice had been that if the colliery company made profits which were more than sufficient to cover the royalty payment, they deducted tax before they paid the royalty owner, under Sched. A, Case III, r. 5. In the depression through which the industry has passed in the last decade, cases arose where, although the profits were insufficient, royalty continued to be due. The revenue assessed those profits under Sched. A

Case II, r. 7, contending that where a royalty owner was paid royalty without deduction of tax because the payment did not come within r. 5, that was "all other profits not before enumerated . . . arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged." It was, however, held in *Stewart v. Normanby Estate Co., Ltd.* (8), where a mining company let mines at a fixed rent and royalties and the lessees deducted tax at the standard rate from the full amount of their payment, that the rents and royalties could not be made the subject of assessment under Sched. A, Case II, r. 7. There was only one subject matter of taxation under the rule, namely, the mining concern, and therefore, by reason of the wording of the rule, the revenue could not bring in another subject matter. Case III, r. 5, could not operate, because there were no profits. The colliery owner therefore escaped taxation, a result which could not have been intended or be allowed to continue; therefore Parliament enacted the Finance Act, 1934, s. 21.

The learned judge has construed sect. 21 (1) as if the words "the property in which is not separately assessed and charged under Sched. A" applied to an easement as well as to land. That is clearly wrong, and not justified by the language. Parliament intended those words to apply to rent payable in respect of land and not to an easement. If those words had not been enacted, the ordinary rent which a colliery company pays for an office on the surface of the land, which might not be over the mine at all—which it pays for ordinary surface rights, quite apart from any right to let down the surface—would come under the provisions of the section. As the section was intended to deal with such payments as royalty payments under the heading "Land," it was clearly right to except rent which was ordinary Sched. A surface rent. When the section comes to deal with easements, wayleaves, and so on, those words do not appear, because Parliament intended to tax payments of that kind, which arise out of the special needs of a mining concern. The definition of an easement includes "any right, privilege or benefit in, over, or derived from land." The application of the principle by LAWRENCE, J., does not fit that definition. If the payment in *Elliott v. Burn* (1) had been a full incorporeal hereditament, it would have been taxable under r. 7 as :

another profit arising from lands not being in the actual possession or occupation of the person to be charged.

If the right diminished the Sched. A value, it would be an illogical result if the rent were held to be covered by the Sched. A assessment.

ROMER, L.J. : Suppose that the owner of a field grants some other person a right of way over it for an annual sum. For the purposes of Sched. A the revenue would not ask what rent a lessee would pay for that land subject to the right of way, but what rent a lessee would pay

for the purpose of getting the profits from the land, including the rent for this right of way. That, surely, is the way to assess the annual value of the land.

The Attorney-General: Yes, if there were any such general provision applicable to wayleaves. Where there is no express statutory provision, the Act of 1934 contains provisions for charging under Sched. D rent for easements enjoyed by colliery companies and railways. If the rent is charged under that provision, it cannot be made an ingredient of a Sched. A assessment. A

Hills, following for the Crown: The argument of *Latter, K.C.*, in *Elliott v. Burn* (1) sought to keep the receipts out of charge under Case II, r. 7. He submitted that only a full incorporeal hereditament could come within that rule, and that under rr. 1, 2 and 3 alike a property in land must be shown. The Crown contended that any right of using land which a landlord might grant to someone other than the occupying tenant might come within r. 2. B C

GREENE, L.J.: In *Elliott v. Burn* (1) the rule under which the Crown sought to assess tax was a rule under which the recipient of money was being directly assessed. The rule here in question lays down that if a person is paying money of a particular kind, two things are to happen: (i) when he makes a payment he will deduct the tax; (ii) in the computation of his own profits he must not make any deduction in respect of payment. In *Elliott v. Burn* (1) the first argument was that, from the point of view of the recipient who was being assessed under that case, this was a profit "arising from lands, tenements, hereditaments or heritages," and the answer was that the right was not an easement but an incident natural to the land itself, and was already covered by the assessment. The Crown then said: Assume that from the point of view of the owner of the land the right to support is not an easement from which he is getting a profit, but that from the point of view of the person who is paying the money it is an easement: then it is a profit arising from lands, etc.—to wit, an easement, a right to let down the surface. *LORD WARRINGTON* gives two answers to that contention: (i) it is not a grant of a right to let down the surface at all; and (ii) it is not correct to speak about a profit arising from the right in the owner of the alleged easement to let down the surface. His Lordship says that he cannot see how money received as the consideration for granting the right to inflict that detriment can be profits or gains arising from the ownership of the surface. The right is the right to inflict a detriment, and that cannot be brought within the meaning of the section. The Crown has here to deal with the first answer to the second question: whether this is or is not a right to let down the surface—an easement. The commissioners say it is not, and their finding is a direct reference to the passage in *LORD WARRINGTON'S* judgment, at p. 614, where he found that, on the D E F G H

construction of the agreement, it was merely an undertaking by the grantors not to sue for damages, and did not grant a right to let down the surface. If that is so, the question will arise whether it is nevertheless a right, privilege or benefit, etc.

Hills : Of course the owner has, against the whole world, a right to exclude trespassers, whether on the surface or under it, but he may grant a man an easement to trespass.

GREENE, L.J. : If the grantor is giving a right to a man to do what otherwise would be a nuisance, he is merely exercising the ordinary enjoyment of his land and is not creating a separate hereditament out of which he makes a profit within r. 7.

Hills : LORD WARRINGTON could not have meant to say that in no circumstances where an owner grants a person a right to do something that would otherwise be a trespass, can he possibly be granting an easement.

GREENE, L.J. : The right there was not an easement, because it had to be shown to come within "lands, tenements," etc. Here the Crown say that the right is an easement because it is an incorporeal hereditament. LORD WARRINGTON said that it was not an easement on the true construction of the document. The question here is whether the right to let down the surface is a "right, privilege, or benefit in, over or derived from land." Therefore LORD WARRINGTON'S examination of the construction of the contract in that case does not cover this point.

Hills : In *Sitwell v. Londesborough (Earl)* (3) it was held that, although the tenant for life of settled land had no power to authorise lessees of the minerals to let down the surface of land the subject of the settlement, nevertheless under the Settled Land Act, 1882, s. 6, he could grant a lease of that right. That section provides that he may lease settled land or any part thereof or any easement, right, or privilege over or in relation to the same. In that case WARRINGTON, J., clearly regarded the right as an easement.

Bowe, for the respondent company : The court is concerned, not with assessments in general, but with the facts of this case. These facts cannot be distinguished from those in *Elliott v. Burn* (1), but even if, on the facts in that case, the Finance Act, 1934, s. 21, is escaped, that does not deprive the word "easement" in sect. 21 of a reasonable field of application. It will apply to any payment in respect of an easement that has passed the test in *Elliott v. Burn* (1). The words "is not separately assessed" do not qualify "easement." The whole of the introductory words in sect. 21 down to the word "easement" imply that any property separately assessed under Sched. A, Case I, is excluded from the whole section, and do not govern "easement." The House of Lords decided in *Elliott's* case (1) that the payment related to a natural incident of the land which arose from the ownership of the land, and

that it was within Sched. A, Gen. Rules, r. 1, and was therefore covered by the assessment on the annual value. By the first half of sect. 21 (1) any property which is separately assessed under sched. A is not within the section. The provision must apply in the second half by necessary intendment. The word "easement" is an artificial word, and is defined in very general terms. If it be right to tax on these lines a property which is rightly assessed in itself under Sched. A, Case I, then Sched. A is almost completely destroyed, for nine-tenths of its effect is taken away. If an ordinary tenant pays rent to a landlord, the landlord is in the position of a person who receives rent for any "right, privilege or benefit in, over or derived from land." If the Crown will not agree that the property described in the first half of subsect. (1) is outside the operation of the subsection, then, for the first time since 1842, another code is imposed upon the ordinary rent payments made by a tenant-occupier to a landlord: i.e., the recipient can now be assessed under Sched. D, and rr. 19 and 21 can apply. The only way in which the court can avoid this result is to assume that the intention of the subsection is to omit all hereditaments that have been and are separately assessed under Sched. A, Case I. If that reading is right, the respondents must succeed, because the House of Lords have held that these payments are necessary incidents of the land and form part of a hereditament which is assessed under Sched. A. If that reading is wrong, then on the facts of the case those payments were not made in respect of any "right, privilege or benefit in, over or derived from land." *Elliott v. Burn* (1) is a leading case, not only in revenue, but also in property law, and it decided that in those cases where payments are purported to be made for the right to support, where they are made for a limited and uncertain time and where compensation provisions are to be found, those payments are not in the nature of rent or payments for right of support at all; they are not an easement, because the very existence of the compensation provisions postulates that the right of support has never disappeared. Eight judges have taken the view that payments of this kind are not in the nature of payments in respect of an easement at all, but merely consideration for an agreement not to sue or to claim an injunction.

Scrimgeour, following for the respondents: On the authority of the House of Lords in *Elliott's* case (1), three propositions are established. First, the ownership of land carries with it, as an incident, the right to sue for damages for a nuisance caused by the withdrawal of support and a letting-down of the surface. Secondly, if an agreement not to exercise that inherent right to sue is made in consideration of sums of money, those sums are not in the nature of annual profits or gains. Thirdly, if these payments are of the nature of profits, they are profits which arise from the ownership of the surface, and have therefore already been fully taxed under Sched. A, and cannot be taxed again. This

section was not intended to give the Crown a double tax in respect of the ownership of the surface of land.

A *The Attorney-General*, in reply : If this case is covered by the words of sect. 21, then the retrospective provisions of subsect. (2) attach and protect the company from any claim by the landlord that they wrongly deducted tax during the years in which the payments were made. Subsect. (2) was passed because a number of colliery companies had made these deductions in some cases where their profits were not sufficient to cover the amount of royalty or other rent payment made. If the present case is within sect. 21, these deductions are legalised by subsect. (2), and the company cannot claim to deduct them as trade expenses, because the statute has legalised them as being properly payable out of profits and gains, subject to deduction of tax.

C The definition and the section must be read together. Where there is a plain case of rent for land *in toto*, it is covered by that part of the section which deals with "rent payable in respect of any land." A right or privilege means that a person is entitled to do something without legal let or hindrance. If, at a given moment, that right does not exist in him, he can only obtain it by grant, contract, or agreement, D by which somebody, who would otherwise be entitled to prevent him by process of law, agrees or undertakes or makes a grant in such a way that he can no longer so prevent him. In the statute, "easement" is clearly defined both by the words of the definition and by their context following on the definition of land. The definition goes far beyond r. 7, E under which it is necessary to establish a hereditament. No better words could be devised to cover a right of the present kind than "Right, privilege or benefit in, over or derived from land."

F SLESSER, L.J. : In this case, the New Sharlston Collieries Co., Ltd., claim that a sum of £1,000 should have been allowed as a deduction in computing its profits and gains for the purposes of assessment for each of the years 1928/29 to 1933/34, in that it contended that the annual sums of £1,000 were contractual payments made by the company for the right to work its own minerals in its own way free from any liability to an action for committing a nuisance in respect of mere depression or lowering of the surface not causing any actual damage or injury. The commissioners of inland revenue, on the other hand, deny that such sums of £1,000 are proper deductions, and contend that they were payments of rent in respect of an easement as defined by the Finance Act, 1934, s. 21. The Act in question was not in operation at G the time when the assessments were made, but it was agreed by both parties that the retrospective effect provided by sect. 21 (2) should operate H as applicable, and it is upon this assumption that my judgment is given.

By sect. 21 (1) of the 1934 Act it is provided that :

Where rent is payable in respect of any land the property in which is not

separately assessed . . . in respect of any easement, and—the easement is used, occupied or enjoyed in connection with [certain concerns, which include coal-mines] the rent shall be charged with tax under Sched. D and . . . be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of a user of a patent as if it were such a royalty.

This is a reference to Sched. D, Cases I and II, r. 3 (*m*), which is to the effect that :

In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(*m*) any royalty or other sum paid in respect of the user of a patent.

Before the commissioners, it was conceded that the yearly sum of £1,000 did not come within Sched. A, No. III, r. 5, nor within Income Tax Act, 1918, Gen. Rules, r. 19, and the sole question before them was whether it fell within the Finance Act, 1934, s. 21. The commissioners held that the advantage which the company enjoyed was a contractual one and did not amount to an easement, and that therefore the company was entitled to relief in respect of an error or mistake under the Finance Act, 1923, s. 24, and that the sums payable annually under the indenture were proper debit items in computing the company's profits for the purpose of the Income Tax Acts. LAWRENCE, J., was of the like opinion, and from his judgment the Crown appeals.

The question, therefore, which has to be decided is whether the £1,000 so paid was or was not rent in respect of an easement within the meaning of sect. 21 of the 1934 Act. By sect. 21 (4), the expression "easement" is said to "include any right, privilege or benefit in, over or derived from land." This inclusive definition is considerably wider than what is properly to be taken as an easement apart from the statutory language. Thus an easement in law is an incorporeal hereditament and has various qualities which are conveniently set out in GALE ON EASEMENTS, 11th Edn., p. 10, but the word of art here employed goes far beyond any such definition, and, to my mind, clearly includes rights which can in no sense properly be described as hereditaments at all. By the indenture of July 31, 1901, between the owners and lessees, what was here obtained by the respondents, who are such lessees of minerals (previously, by indenture of June 24, 1865, not entitled to work the mines so as to let down the surface), was full and free liberty, power, and authority to work the mines, notwithstanding that such working might cause subsidence of, or withdrawal of support from, the surface of the lands, but the owners reserved the right to compensation in respect of actual injury to buildings, etc., on the land caused by subsidence; no compensation was to be paid in respect of mere depression or lowering of the surface not so causing actual damage or injury to buildings, etc. For this qualified right to work the mines, the respondents paid the rental of £1,000 a year, which is here the subject of consideration. In the court below, the judgment turned not so much upon the problem

whether this right above stated was a right, privilege or benefit in, over or derived from land, as defined by sect. 21 of the 1934 Act, as upon the effect of the decision in the House of Lords in *Elliott v. Burn* (1), and the commissioners also allowed the consideration of that case

A materially to affect their judgment.

I turn, therefore, to that authority in order to see what effect, if any, it should have upon the present decision. It may be said at the outset that the agreement in that case was to all intents and purposes similar to the present one; it contained full liberty in working mines under the lands
 B of the lessors to withdraw from the said lands any support for such lands, whether vertical or lateral, and added thereto that actual damage caused to the lands and buildings thereon should be compensated in special manner. Thereon it was argued by the Crown, in seeking to charge the owners, that they had received taxable profits in respect of rent
 C paid for the grant of such liberty to the lessees with power to withdraw support, and that such profits arose from "lands, hereditaments, tenements or heritages not being in actual possession of the person to be charged" within Sched. A, No. II, r. 7, applied by the Finance Act, 1926, to Sched. D. LORD WARRINGTON took the view that the
 D payments in question were to be regarded as arising from the ownership of the land itself, in that the right of the surface owner to support was not an easement but an actual incident of the land itself, and that the profit came to the owners in respect of their property in the lands themselves. As regards the colliery company, which more particularly here
 E concerns us, he said that no easement to let down the surface was conferred upon it. The right of the colliery company was no more than an immunity from damages or injunction—there was no withdrawal from the lands of the owners of the right of support itself which they still possessed. In respect of the rents he held, therefore, that the
 F tax had already been ascertained on the annual value of the lands: see *Fry v. Salisbury House Estate, Ltd.* (2); and this assessment, in his Lordship's view, covered the whole claim, including these rents paid.

So here, I think, on a similar agreement, we are bound to say that the owners have not granted a hereditament by way of easement, nor has
 G the colliery company vested in it an incorporeal hereditament to let down the surface, but only a release from liability to pay damages in certain events. But this judgment does not, to my mind, decide the matters we have to determine in the present case. In *Elliott's* case (1), the problem there posed was whether the owners' profits sought to be taxed
 H arose from lands, tenements, hereditaments or heritages. Here the question is whether the rents, said to be proper deductions by the lessees, arise out of a right, privilege or benefit in, over or derived from land, within the language of sect. 21 of the 1934 Act, and I am unable to see why, because it has been authoritatively said that, from the standpoint

of the lessees, a right to be saved harmless from liability for damages or injunction for certain nuisance, is not a hereditament vested in the colliery company, that, therefore, it follows that the payment of rent in respect of the privilege not to be sued for compensation, save for certain kinds of actual damage, is not a rent payable in respect of a right, privilege or benefit in, over or derived from land. The immunity from action is clearly a benefit, and, in so far as that action, if it were brought, would be one for nuisance in respect of land, it follows that the rent paid is in respect of benefits over or derived from land within the scope of the extended definition in the Finance Act, 1934, s. 21. In my view, *Elliott v. Burn* (1), in dealing with the limited subject matter of an easement and hereditament at law (primarily from the point of view of the owners but inferentially from that of the lessees), does not extend to cover the artificial enlarged definition of easements contained in the 1934 Act.

I think that the words in subsect. (4) (b) are wide enough to cover the present case, and there is no authority to constrain me to an opposite conclusion. In my judgment, the Crown succeeds in this appeal; the monies are to be treated as patent royalties are treated, and, therefore, cannot be deducted in computing the amounts of the profits or gains to be charged, which must stand as originally assessed before the alleged error was made. As this is the view of the majority of the court, the appeal will be allowed with costs.

ROMER, L.J. : In order to determine the question that arises upon this appeal, I find it necessary, even at the cost of repetition, to state the circumstances in which it has come before us. By virtue of an indenture dated June 24, 1865, a company called John Crossley & Sons, Ltd., acquired in fee simple certain seams of coal in Yorkshire, and a few years later they leased, or agreed to lease, these minerals to the respondent company for a long term of years. A question subsequently arose between the respondent company and the owners of the lands above the minerals as to the right of the company to work the minerals in such a way as to cause subsidence to the surface. This question was ultimately decided by the House of Lords in favour of the surface owner. It was held that the conveyance of the minerals to John Crossley & Sons, Ltd., had not operated as a surrender or assurance to that company of the right of support incident to the surface lands. The conveyance had contained provisions for payment of compensation to the owners of the surface land or to their tenants for damage occasioned to the surface and the buildings on it in the course of working the minerals, but those provisions were not regarded by the House of Lords as giving by implication a right to let down the surface. LORD DAVEY said :

I do not accede to the argument that the existence of a covenant for payment

of compensation for letting down the surface is . . . in any way inconsistent with the continuance of the common law obligation.

In consequence of this decision, the tenant for life of the surface lands and the respondent company entered into an arrangement which was embodied in an indenture of July 31, 1901. By that indenture, it is recited (amongst other things) (i) that the respondent company alleged that it was unable to work and get to the best advantage the said minerals without letting down the surface of all or some of the overlying lands; (ii) that under the indenture of June 24, 1865, the respondent company was not entitled to let down that surface; and (iii) that the tenant for life, in exercise of the powers therein mentioned (including so far as necessary the powers conferred upon him by the Settled Land Acts, 1882 to 1890), had agreed with the respondent company to grant to it such powers and liberties as were thereafter mentioned. Pausing there, it may be observed that under the Settled Land Acts, 1882, s. 6, a tenant for life had power to grant a lease of a right to let down the surface of the settled land by mining operations for a term not exceeding 60 years. See *Sitwell v. Londesborough (Earl)* (3). By the operative part of the indenture of July 31, 1901, the tenant for life of the surface lands granted and demised to the respondent company full and free liberty, power, and authority for the respondent company, its successors and assigns (all of whom were therein referred to as "the lessees") to work and get and carry away the whole of the mines, veins, and seams of coal comprised in the indenture of June 24, 1865, notwithstanding that such working might cause subsidence of, or withdrawal of support from, the surface to the overlying lands or some of them. It was then provided that nothing therein contained should in any manner affect the right of the owners of the surface land or their tenants to such pecuniary compensation as was provided under the indenture of June 24, 1865, in respect of actual injury to erections or buildings, structures, sewers, pipes, drains, watercourses, or other matters on or in any of the said lands caused by subsidence of the surface of the said lands. Then followed a habendum and a reddendum in the following words:

To hold the same unto the lessees for the term of 60 years from Feb. 2, 1898, yielding and paying therefor during the continuance of the said term a minimum certain clear yearly rent of £1,000 by equal half yearly payments. . . .

There was also a further acreage rent that is immaterial for the present purpose. The indenture also contained an express agreement and declaration that, notwithstanding anything to the contrary in the indenture of June 24, 1865, or in those presents contained, the lessees should not be bound to pay any compensation whatsoever to any person in respect of mere depression or lowering of the surface of any of the said lands not causing any actual damage or injury to any such buildings,

structures, sewers, pipes, drains, watercourses, or other matters as aforesaid. In the absence of authority to guide me, I should have thought that this indenture was effectual to confer upon the respondent company for a term of years the liberty, power, and authority—that is, the right—to deprive the surface of support by working the underlying minerals, in consideration of the payment of the rents and the obligation of paying compensation to the extent therein specified. Such a right could constitute an easement known to the law. See *Rowbotham v. Wilson* (4), and *Sitwell v. Londesborough (Earl)* (3). The indenture, therefore, would have conferred upon the respondent company as lessee an incorporeal hereditament subject to the payment of a rent and of compensation for the actual damage that might be occasioned by the exercise of the rights conferred.

That, I say, is what I should have held unaided by authority. Authority, however, shows that I should have been wrong in so holding ; the authority in question being the decision of the House of Lords in the case of *Elliott v. Burn* (1). In that case, the respondents in the House of Lords were the surface owners of lands in the county of Durham, the minerals thereunder being owned and worked by a colliery company. By an agreement made between the respondents (therein called the lessors) and the colliery company (therein called the lessee) the respondents granted to the colliery company :

full liberty in working any mines or seams of coal which the lessee may for the time being be entitled to work under the lands of the lessors to withdraw from the said lands or any part thereof any support for such lands whether vertical or lateral.

The consideration for this grant was the yielding and paying the yearly certain rent of £150 and also the yielding and paying the rent of 1½d. for every ton of coal worked by the lessee from underneath the respondents' said lands. It was also agreed that any actual damage caused to crops, drains, pipes, or other injury to the said lands, or to any buildings thereon, should be compensated for in addition to the payment of the certain and tonnage rents. The surface of the land had been let by the respondents and was in the occupation of a farmer at an annual rack rent of £296 ; and was taxed under Sched. A, Case I, on this footing.

In each of the tax years from 1923 to 1929 inclusive, sums had been paid by the colliery company to the respondents in respect of the certain and tonnage rents without deduction of tax, and the Crown sought to charge the respondents, under Sched. A (or after the Finance Act, 1926, under Sched. D), with tax on those payments as being "other profits arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupancy of the person to be charged" within the meaning of Sched. A, No. II, r. 7. The contention of the Crown was as follows : By the agreement of Dec. 21, 1922, an

incorporeal hereditament became vested in the colliery company and the rents paid by it to the respondents represented the profits accruing to the respondents from that hereditament, which was a different hereditament from that of the surface lands, and those profits were not, therefore, profits "before enumerated" within the meaning of r. 7. If the agreement did in fact create an easement that was leased by the colliery company, the Crown's contention would appear to have been well founded. Take the case of an owner of land who creates, in favour of an adjoining landowner, a right of way over the land in consideration of an annual payment. From the moment that he does so, he has carved out of his own corporeal hereditament an incorporeal hereditament, and vested it in another; and it is only his corporeal hereditament as so diminished that will thenceforth be taxed under Sched. A, No. I. The annual value will have been diminished to some extent, for the rack rent of land subject to a right of way in another person will presumably be somewhat less than the rack rent of land without any such incumbrance. The rent he receives for the right of way will be a profit accruing to him from another hereditament altogether, and will not have been covered by the tax on his land levied under Sched. A, No. I. The contention of the respondent landowners, on the other hand, was as follows: The right of support by the subjacent minerals is an inherent part of our corporeal hereditament, namely, the land. We have not parted with that right of support, we have merely turned it to profitable account. Income tax has already been charged under Sched. A, No. I, on the full annual value of the land, and no further charge can be made on it under Sched. A or any other schedule. They relied, in other words, upon the well known case of *Fry v. Salisbury House Estate, Ltd.* (2). The Court of Appeal and the House of Lords upheld this contention of the surface owners, differing from FINLAY, J., who had decided in favour of the Crown. In the House of Lords, the only reasoned speech was delivered by LORD WARRINGTON, the other noble and learned Lords merely concurring in the opinion that he expressed. In the course of his speech, LORD WARRINGTON said, on p. 614:

It is now thoroughly well settled, and it is unnecessary to refer to specific authorities in support of the proposition, that the right of the surface owner to support of that surface by subjacent soil is not an easement, but is a natural incident to the land itself. If, therefore, the payments in question are to be regarded as arising from the right of support, they arise from the ownership of the land itself, and would not come within r. 7 of No. II, but within the general rule of No. I, and would be covered by the assessment on the annual value under that rule.

And finally, on p. 615:

So far, if at all, as the payments represent a profit of the respondents, it comes to them in respect of their property in the lands themselves. Tax in respect of this property has been assessed on the annual value of the lands as ascertained under the general rule of No. I and this assessment covers the present claim.

And he referred to the *Salisbury House* case (2). Between these two

passages in his speech, he dealt, as of course it was necessary to deal, with the contention put forward on behalf of the Crown that the agreement of 1922 had vested in the colliery company a separate hereditament consisting of an easement to let down the surface. He said :

The answer to this seems to me to be twofold. In the first place, in my opinion, on the true construction of the lease, no such right was, in fact, conferred upon the colliery company, and, in the second place, such a right, if conferred, would be a detriment to the owners of the surface, and I cannot see how sums of money received as the consideration for granting the right to inflict that detriment can be profits or gains arising to the owners of the surface from such right itself.

Pausing there, it would seem that if a right over land in the nature of an easement be conferred by a landowner in favour of his neighbour in consideration of an annual payment, such payment cannot be said to arise to the landowner *from* such right itself. If the owner of an existing incorporeal hereditament chooses to lease it, the rent payable under the lease indubitably arises from the incorporeal hereditament. Does it do so any the less because the incorporeal hereditament does not previously exist, but is at the same time carved out of some corporeal hereditament and let at a rent ? This question seems to have been decided by the House of Lords in the affirmative. LORD WARRINGTON then continued as follows :

The first answer, however, requires further consideration. I need not repeat the terms of the lease which are sufficiently set forth above. The lease gives to the colliery company, for a limited and uncertain period, liberty, in working any subjacent coal which they were entitled to work, to withdraw from the lands of the respondents any support for such lands. This, I think, merely means that the respondents during the term will not seek either to recover damages for nuisance or for an injunction restraining the colliery company from committing such a nuisance, but there is no actual surrender of the right of support itself. That this is so is, I think, made plain by the provisions of cls. 14 and 15 as to compensation, for it is only on the assumption that the right of support continues to exist, though its immediate assertion may be controlled, that any claim to compensation could possibly arise.

Now, I cannot myself discover any material difference between the agreement with which the House of Lords were dealing in *Elliott v. Burn* (1) and the lease in the present case. It was not indeed suggested in the argument before us that there is any such difference. So far as there is any difference at all, the case in favour of a right to let down the surface was stronger in *Elliott v. Burn* (1) than it is here. For there the lessees were given, in terms, full liberty in working the coal to withdraw support from the surface. Here, the lessee was given liberty to work the coal notwithstanding that such working might cause subsidence of or withdrawal of support from the surface. The leases in the two cases are, however, alike in this, that compensation was to be paid for actual damage done to the surface. A claim to compensation, said LORD WARRINGTON, can only arise on the assumption that the right to support continues to exist, not, as presumably had been argued on behalf of the

Crown, on the assumption that a right to remove that support had been given on the terms of paying compensation.

In my opinion, I am bound to hold that, in the present case, no right to let down the surface has been acquired by the New Sharlston Collieries Co. All that the company acquired under the indenture was a release from all liability to pay damages for nuisance or to be restrained by injunction if it committed or threatened to commit the unlawful act of working its minerals so as to cause a subsidence of the surface land. That act would be just as unlawful after the execution of the indenture as it had been before.

For the six taxing years 1928/29 to 1933/34 inclusive, the respondent company, in its return of profits and gains, made no deduction in respect of the sum of £1,000 payable under the said indenture, though it had paid it in each year to the surface owner under deduction of tax. The surface owner, presumably after the decision in *Elliott v. Burn* (1), claimed that the respondent had no right so to deduct tax; and, on the authority of that case, and assuming that the law applied in that case had not been altered, they were justified in their claim. On the same assumption the respondent company would have been entitled to deduct the £1,000 in each year in making a return of its profits and gains as a necessary trade expense, it being now admitted by the Crown that such deduction would not be prohibited by Sched A, No. III, r. 5. The respondent accordingly applied to the commissioners of inland revenue for relief under the Finance Act, 1923, s. 24, and the Finance Act, 1926, s. 27. Those commissioners refused relief on the ground, I gather, that since the passing of the Finance Act, 1934, the deduction from profits and gains of such payments as the £1,000 in this case and the rents in the case of *Elliott v. Burn* (1) had become unlawful.

The material part of that Act for the present purpose is sect. 21 (1), which, so far as material, is in these terms:

Where rent is payable in respect of any land the property in which is not separately assessed and charged under Sched. A, or in respect of any easement, and (a) the land or easement is used, occupied or enjoyed in connection with any of the concerns specified in rr. 1, 2 and 3 of No. III, Sched. A . . . the rent shall be charged with tax under Sched. D and shall, subject to the provisions of this section, be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty.

If the £1,000 a year be such a rent as is here described, it follows that it cannot be deducted in estimating the respondent company's profits. Sect. 21 (4) enacts that, for the purposes of the section:

(a) the expression "land" means lands, tenements, hereditaments, and heritages; (b) the expression "easement" includes any right, privilege or benefit in, over or derived from land.

The commissioners of inland revenue having refused relief, an appeal from such refusal was taken by the respondent company to the commissioners for special purposes. The respondent company contended

before them : (i) that the indenture of July 31, 1901, conferred no right on it to withdraw support ; (ii) that it gave it no estate or interest in the surface lands ; (iii) that the advantage of working its mines without hindrance from the surface owner was not an easement within the meaning of the Finance Act, 1934, s. 21 ; (iv) that the sum of £1,000 was a contractual payment made by the company for the right to work its own minerals free from any liability to an action for committing a nuisance, and was accordingly a proper deduction in computing its profits and gains. It was contended on behalf of the commissioners of inland revenue, so far as is now material, that the advantage enjoyed by the company was an easement, and the payments made in respect thereof were rent within the meaning of the said section. The appeal was allowed by the special commissioners. They held, in effect, that the case was covered by *Elliott v. Burn* (1), that the advantage which the respondent company enjoyed under the indenture of July 31, 1901, was a contractual one and did not amount to an easement. They said that the advantage which the respondent company enjoyed of working its own property free from interruption was not a right, privilege or benefit in, over or derived from land, within the meaning of the section. The Crown appealed to LAWRENCE, J., from that decision, but that learned judge upheld the decision of the special commissioners, and, as I read his judgment, on substantially the same grounds as those which they had given. He considered that the case was indistinguishable from *Elliott v. Burn* (1), and that he could not, consistently with that decision, treat the advantages given to the respondent company as being an easement within the definition contained in sect. 21. From this decision, an appeal has been brought to this court.

It is plain that the first question to be determined is whether the advantages given to the respondent company by the indenture of July 31, 1901, constitute an easement within the meaning of the Finance Act, 1934, s. 21. For it could not and has not been argued that the £1,000 is a rent payable in respect of any land as distinct from one payable in respect of an easement, which is treated by the section as something different from land, though land, according to subsect. (4), includes any hereditament. Are, then, the advantages given to the respondent company by the indenture in question an easement within the meaning of the section ? I have already stated that, unaided by the decision in *Elliott v. Burn* (1), I should have answered this question in the affirmative, on the ground that the company thereby obtained the right of letting down the surface of the land upon the terms therein mentioned. This right, if given, would undoubtedly have constituted a privilege or benefit in and over and (possibly) derived from the land. But if what the respondent company obtained was not a right to let down the surface, but merely a release from the liability of being sued for damages

for a nuisance or for an injunction, it obtained no right or privilege or benefit in or over or derived from the land. It was merely a contractual right, privilege or benefit derived from the owner of the land. Unless *Elliott v. Burn* (1) can be distinguished from the present case, this is all that the respondent company obtained. I have read and re-read the relevant documents in the two cases in an anxious endeavour to find a sufficiently material distinction between them. I thought at one time, in view of the fact that the indenture in the present case was entered into so soon after the House of Lords had decided that the respondent company had no right to withdraw support from the surface, that there was some presumption that the purpose of the indenture was to give it such a right in consideration of the payment of the annual rent. But in *Elliott v. Burn* (1) the agreement contained recitals to the effect that the lessors claimed that the lessees were not entitled to work the mines in such a manner as to let down the surface, and that it had been agreed that the lessors should grant to the lessees "liberty in working the mines and seams of coal to let down such surface upon the terms hereinafter appearing." There was, therefore, at least as good a reason in that case for making a presumption in favour of the right being granted as there is in the present case. It further occurred to me that, in the present case, the advantages were being conferred upon the mine owners by a tenant for life of the surface land, and that, though he had power to grant an easement of letting down the surface, he had not, so far as I know, any right to deprive his successors in title of the right to claim damages or an injunction in respect of subsidence. But the same difficulty would have arisen in *Elliott v. Burn* (1). Unless in that case an easement was granted, I do not see how persons claiming the land through the surface owners could have been bound by the surface owners' agreement not to sue, even though the surface owners there were absolute owners. The agreement was a purely personal one, and the burden of it would not have run with the land. I am unable to distinguish the two cases. That being so, I am of opinion that LAWRENCE, J., and the special commissioners arrived at a right conclusion, and that this appeal should be dismissed.

If it were possible to hold, consistently with the decision in *Elliott v. Burn* (1), that, under the indenture of July 31, 1901, the respondent company obtained an easement, that is to say some right, privilege or benefit in, over or derived from the overlying land, the second question to be decided on this appeal would be whether the £1,000 is a rent payable in respect of that easement. As to this, I need only say that, in my opinion, there is nothing in *Elliott v. Burn* (1) to preclude us from holding that it is. All that was decided in that case in relation to this point was that the yearly sums which were there payable did not "arise" from the rights given.

I only desire to add this. The parties to the appeal were agreed that the Finance Act, 1934, s. 21, is retrospective. This, they said, was the effect of subsect. (2). Whether they are right in this, or not, is a question upon which I desire to express no opinion.

GREENE, L.J. : In this case the respondent company, being lessee of certain minerals without any right to let down the surface, obtained from the surface owners by indenture dated July 31, 1901 :

full and free liberty power and authority . . . to work and get and carry away the whole of the said mines . . . notwithstanding that such working may cause subsidence of or withdrawal of support from the surface.

The indenture contained a proviso that nothing therein contained should affect the rights of the surface owners or their tenants to such pecuniary compensation as was provided for under the original conveyance of the minerals in respect of actual injury to buildings and other matters on the land caused by subsidence. There was an express clause to the effect that no compensation was to be payable in respect of mere depression or lowering of the surface not causing actual damage or injury to such buildings or other matters. The consideration payable by the respondent, which was described as a rent, was the sum of £1,000 a year certain together with an acreage rent or royalty.

The question to be decided on this appeal is whether or not in computing the profits of the respondent company's business for the purpose of assessment under Sched. D for the years 1928/29 to 1933/34, it is to be treated as having been entitled to deduct as an expense the sum of £1,000 payable under the indenture in those years. It is agreed by both parties to the appeal that, by reason of the retrospective provisions contained in the Finance Act, 1934, s. 21 (2), the question is to be dealt with as though that section had been in force during the relevant period, and I will accordingly deal with it on that basis, without expressing any opinion as to the correctness of that view. The section provides in subsect. (1) that, where rent is payable in respect of any land the property in which is not separately assessed and charged under Sched. A or in respect of any easement and the land or easement is used, occupied, or enjoyed in connection with, among others, a colliery concern, the rent shall be charged with tax under Sched. D, and shall be treated in the same way as a royalty paid in respect of the user of a patent. The result of this provision, in the case of the payments to which it refers, is that the sums paid cannot be deducted in computing the profits of the payer's business, but the payer is entitled to deduct tax when making the payment to the payee. Subsect. (4) defines "easement" as including "any right, privilege or benefit in, over or derived from land." Looking at that definition by itself, I should have thought it reasonably clear that the right conferred on the respondent by the

indenture of July 31, 1901, was a right, privilege or benefit in, over or derived from land. That indenture expressly gives a right to the respondent so to act in relation to the surface as to cause it to subside, and the fact that a right to compensation is preserved would not appear

A to affect this circumstance. But in the history of this case two different views have been taken. The special commissioners, founding themselves upon *Elliott v. Burn* (1), held that the right to claim damages in respect of buildings and other matters, which is expressly preserved by the indenture of July 31, 1901, could not exist if the right to support of the

B surface had been surrendered or extinguished. In other words, they treated that indenture as granting no easement within the meaning of the definition clause in the section, on the ground that it merely excluded the right of the surface owners to pursue certain legal remedies in respect of workings which might interfere with the surface. LAWRENCE, J., on the

C other hand, decided in favour of the respondent company upon a different ground, which was also based on the decision in *Elliott v. Burn* (1). That ground was that the right conferred by the indenture was an incident of the land itself, and had already suffered tax under Sched. A, No. I, and that the word "easement" ought not to be read so as to include

D a right which is incident to, and part of, land the property in which has already been assessed and charged.

These decisions make it necessary to examine with care the case of *Elliott v. Burn* (1). The question in that case arose under Sched. A, No. II, r. 7. The Crown there was seeking to tax the recipient of annual

E payments arising under a document the effect of which, it is agreed, was in all essential matters the same as that of the indenture of 1901 in the present case. In order to succeed, the Crown had to establish that the sums in question were profits "arising from lands, tenements, hereditaments, or heritages not being in the actual possession or occupation

F of the person to be charged." The matter therefore fell to be regarded from the point of view of the recipient, and the question was, did the profits arise to him from rents, tenements, hereditaments, or heritages not in his actual possession or occupation? Now the surface itself was in the actual possession and occupation either of the owner or of his tenant,

G and the Crown endeavoured to escape this difficulty by treating the right of support as a separate hereditament for the purpose of r. 7, and the rent payable as a profit arising from that hereditament. The House of Lords negatived this contention. LORD WARRINGTON, in whose opinion the other members of the House concurred, points out that, in a sense,

H the sums there in question arose from the right of support which belonged to the surface owner, but that the right of support is nothing more or less than a natural incident to the land itself, and the property in that land had already borne tax under Sched. A, No. I. Down to this point, LORD WARRINGTON is dealing with the right conferred from the point

of view of the surface owner ; but the Crown raised an alternative contention, and endeavoured to examine the nature of the right from the point of view not of the grantor of the right, but of the grantee. They argued that, in the hands of the colliery company, the right was a hereditament, being, as it was said, a right or easement (in the strict sense) A to let down the surface in working its mines without objection on the part of the surface owners. LORD WARRINGTON gave two answers to this contention. The first was that upon the true construction of the document no such right was in fact conferred upon the colliery company—it was on this that the finding of the commissioners in the present case B was based. He arrived at this conclusion by construing the provision giving liberty to withdraw support as merely meaning : “ that the respondent will not seek either to recover damages for nuisance or an injunction restraining the colliery company from committing such a nuisance,” and as effecting : “ no actual surrender of the right of support C itself.” The second reason given by LORD WARRINGTON for dismissing the Crown’s alternative argument is not relevant to the present appeal. Now, it will be observed that, as LORD WARRINGTON points out, at p. 613, the Crown in that case had to establish that the sums in question arose from some “ hereditament,” and in holding, in answer to the Crown’s D alternative argument, that upon its true construction the document there in question did not effect an actual surrender of the right of support, he was using that expression in relation to the language of Sched. A, No. II, r. 7, which was the rule there in question, namely, the word “ hereditament.” His construction of the document necessarily negatived E the Crown’s contention that the sum arose from a “ hereditament ” ; but with all respect to the opinion of the special commissioners I cannot see how that decision in *Elliott v. Burn* (1) provides an answer to what is the relevant question in this case, namely, is the right conferred by the indenture of 1901, a “ right, privilege or benefit in, over or derived from F land,” words whose import goes far beyond that of the technical word “ hereditament ” contained in r. 7 ?

The decision of LAWRENCE, J., is based on an application of the principle upon which LORD WARRINGTON answered the first contention of the Crown in *Elliott v. Burn* (1). But with all respect to the learned G judge, I cannot agree with his conclusion. In *Elliott v. Burn* (1), as I have already said, it was necessary to point to a “ hereditament ” distinct from the land itself, the reason for this being that, in relation to the facts of that case, r. 7 so provided. The House of Lords held that the attempt to sever the right of support from the land in order to H convert it into a separate hereditament was based on a misconception of the law relating to the right of support. Under the Finance Act, 1934, s. 21, once the existence of an easement within the meaning of the section is established, the question whether the land in respect of which

the easement is enjoyed is or is not separately assessed and charged under Sched. A is, in my opinion, irrelevant. The opening words of subsect. (1) make this clear, since they draw a clear distinction between rent payable in respect of any land the property in which is not separately assessed and charged under Sched. A and an easement in the case of which no such qualification is requisite in order to bring the section into operation. There may be difficulties in understanding the reasons for which the legislature, in the case of concerns affected by sect. 21, decided to treat easements enjoyed by them in this special manner. But in my opinion the section is too clear to permit of the interpretation which the learned judge has placed upon it.

My conclusion is that the case of *Elliott v. Burn* (1) in truth does not decide the question either in favour of the view taken by the special commissioners, or in favour of that taken by the learned judge. Its only relevance to the present question lies, I think, in the fact that, in construing a document in all material respects similar to that now in question, the House held that it did not operate to effect an actual surrender of the right of support, but merely prevented the surface owner from taking the appropriate legal proceedings if the right of support were interfered with or threatened. Accepting this finding as governing the construction of the present instrument, I still find myself unable to say that the rights conferred by it do not fall within the wide definition of "easement" in sect. 21. It may be observed that, unlike Sched. A, No. II, r. 7, r. 21 regards the right conferred and the payments made in respect of it from the point of view of the grantee of the right who makes the payment. From this point of view, it appears to me that, by virtue of the indenture of 1901, the respondent company obtained an "easement" in that it obtained the right to act in such a way as to affect the physical condition of the surface without exposing itself to the operation of certain of the legal remedies which would otherwise have been available to the surface owners. It is perhaps worth noticing that if the respondent company's contention be right, the effect of the section could in general be avoided, in a case where a concern desired to obtain an easement, by the simple expedient of so drafting the document as to make it in effect an undertaking not to sue, for example, for damages for trespass in a case where a wayleave was desired. It appears to me that the language of the definition clause, using, as it does, words of general import, and not technical expressions, is sufficiently wide to prevent such a result.

In my opinion, the appeal should be allowed with costs.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Blundell, Baker & Co.*, agents for *Greaves, Atter & Beaumont*, Wakefield (for the respondent company).

[Reported by DEREK H. KITCHIN, Esq, Barrister-at-Law.]

FOSBROKE-HOBBS *v.* AIRWORK, LTD., AND BRITISH-AMERICAN AIR SERVICES, LTD.[KING'S BENCH DIVISION (Goddard, J.), **December 15, 16, 17, 21, 1936.**]

Carriers—Carriage by air—Contract by correspondence—Subsequent delivery of ticket containing conditions—Charter of private aeroplane—Liability to charterer's guests—Evidence of negligence—Res ipsa loquitur.

Negotiations were entered into with the first defendants for the hire of an aeroplane for the carriage of the hirer and a party of guests. The aeroplane hired was in fact the property of the second defendants and the pilot was their servant. The negotiations, however, were conducted throughout by the first defendants, and it was found that they held themselves out as principals. No mention was made of any special conditions. Just as the aeroplane was preparing to leave, an envelope containing a "ticket" was handed to the hirer by the pilot. The "ticket" was a document called a special charter which contained *inter alia* a number of conditions, one of which exempted the second defendants from liability for their own or their servants' negligence. The ticket contemplated signature by the "passenger" and its return when signed to one of the second defendants' officials. Before the hirer had an opportunity of seeing the contents of the envelope, the aeroplane started on its journey and almost immediately it crashed, two of the hirer's guests being killed. The disaster was found to be due to the negligence of the pilot. In an action by the widow of one of the guests on behalf of herself and her three infant daughters for damages under the Fatal Accidents Act:—

HELD: (i) as there was no contractual relationship between the first defendants and the hirer's guests, the first defendants were not liable to the widow.

(ii) a condition binding on the hirer would also be binding on his guests, as the burden was upon the hirer to pass on to his guests the information as to the existence of the conditions.

(iii) the condition exempting the second defendants from liability was not communicated to the hirer before the journey started, and the second defendants were not protected by it. As the pilot was negligent, the second defendants were liable to the plaintiff for her husband's death.

[EDITORIAL NOTE.] The main point of interest in this case is the question whether the second defendants can avail themselves of the exemption from liability contained in the ticket or contract. In the present case there had been a prior agreement by correspondence, and if this was to be varied by the ticket, it is clear that the ticket should have been brought to the hirer's notice. It must be noted that this is the hire of a private aeroplane and not a ticket for travel in a regular public service. The point that everyone must be taken to know that air carriage of passengers is only undertaken subject to special exemptions is held not to be applicable. Another point in the case is the application of the doctrine *res ipsa loquitur* to an aeroplane accident.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 4, pp. 63-65, paras. 97, 98; and FOR CASES, see DIGEST, Vol. 8, pp. 71, 75, Nos. 479-513.]

Cases referred to:

- (1) *Carpue v. London & Brighton Ry. Co.* (1844), 5 Q.B. 747; 38 Digest 110, 790.
- (2) *Holliday v. National Telephone Co.*, [1899] 2 Q.B. 392; 34 Digest 163, 1271.
- (3) *Penny v. Wimbledon Urban Council*, [1899] 2 Q.B. 72; 34 Digest 161, 1260.

(4) *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K.B. 191; Digest Supp.

(5) *Nunan v. Southern Ry. Co.*, [1923] 2 K.B. 703; [1924] 1 K.B. 223; Digest Supp.

(6) *Thompson v. London Midland & Scottish Ry. Co.*, [1930] 1 K.B. 41; Digest Supp.

A

ACTION for damages for the death of Major Adrian Wrigley Fosbroke-Hobbes by Mrs. Mabel Mary Fosbroke-Hobbes, suing under the Fatal Accidents Act, 1846, as executrix on behalf of herself and her three infant daughters. The facts are fully set out in the judgment.

B

Roland Oliver, K.C., Harold Murphy, K.C., and C. Leonard for the plaintiff.

Sir Stafford Cripps, K.C., and F. W. Beney for the first defendants.

D. P. Maxwell Fyfe, K.C., H. G. Robertson, and Patrick Browne for the

C

second defendants.

GODDARD, J.: On July 16, 1935, a party of some seven persons met at the Heston Airport on the invitation of Mr. Horace Vickers, senior partner in the firm of Vickers, de Costa & Co., to fly by aeroplane

D

to the Naval Review. The aeroplane which they entered was the property of the second defendants, who had engaged the services of a pilot, one Mr. Fine, for that day. Mr. Vickers himself was unable to join the party, as he had been called on a jury, but his son, who had arranged for the hire of the plane, was present, and, I suppose, was to act as host in place

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of his father. The party got into the plane, which then ran some 400 or 500 yds. across the aerodrome, and rose into the air. It achieved a height of somewhere between 75 ft. and 100 ft., and then crashed to the ground, not more than 1,000 yds. from the place whence it started, and just outside the aerodrome. The plane caught fire, and two of the

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party, one of whom was the plaintiff's husband, lost their lives. She brings this action, under the Fatal Accidents Act, for the benefit of herself and her three infant daughters. That this disastrous accident was due to the fault of the pilot is, in my opinion, abundantly clear. In the first place, I hold that the doctrine *res ipsa loquitur* applies. While

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it is unnecessary to decide whether this doctrine would apply to every accident occurring to an aeroplane in the course of a prolonged flight, here we have a disaster at the very beginning, just as the machine had taken off and well before it had attained the height at which the journey would be performed. It was an accident which I think all are agreed

H

ought not to have happened.

It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers

of aeroplanes are daily engaged in carrying mails and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches : *Carpue v. London & Brighton Ry. Co.* (1).

The accident happened owing to the plane not gaining enough, or losing, flying speed, and the pilot sought to explain this by attributing it to a down current of air attracted by a ploughed field over which he flew as he left the aerodrome. I cannot accept his explanation ; on the contrary, I think the plaintiff's witnesses established a positive case of negligence in that the pilot started his run and left the ground with the tail-end of the machine too far down, at an angle which prevented the machine from gaining speed, and caused it to stall. It is unnecessary to decide the precise reason why he allowed the machine to be at this angle. It may be that his actuating gear was not enough advanced, or was not so far advanced as he thought it was, so that he did not put enough pressure on his joystick, as it is called, to counteract this state of affairs. That he did start away at an angle, which all witnesses agree would be improper, is, in my opinion, clear enough, and I was particularly impressed by the evidence of a Mr. Israel on this point. He was a careful and trustworthy witness, and I am satisfied his evidence was correct. It is only fair to Mr. Fine to say that, on realising the danger, he kept his head in a most praiseworthy manner, and did his utmost to minimise the result ; it was indeed due to his effort that the consequences were not more disastrous than they were. But I am constrained to hold that the accident was due to his default.

I have now to determine whether this negligence gives the plaintiff a cause of action against either or both of the defendants. The first defendants are, as I have said, the owners of the airport ; in fact they do not own any aeroplanes. Mr. Vickers, junior, got into communication with them by telephone. Neither he nor his father knew anything of the position of these defendants, except that they were the proprietors of the aerodrome. Mr. Vickers told them he wanted a plane capable of holding seven persons to go to the Spithead Review, and they said they would write to him. This they did, on July 5. There is no indication in the letter that they acted only as agents or brokers, and there is not the least reason to suppose that this was known either to Mr. Vickers or to his son. The latter requested a Mr. Hazlerigg, who was in their office, and who happened to be going down to the aerodrome for a game of squash rackets, to see if he could get the price reduced. There was a considerable conflict of evidence as to whether, at the interview

which he had with these defendants' representatives at the aerodrome, he was told that they only acted as agents. But I am satisfied that it was never made clear to Mr. Hazlerigg that the defendants were acting only as brokers. All he had been asked to do was to see if he could get the price reduced, and that was all he concerned himself with at the interview. I think it very likely that he was told that he had been quoted a standard price, and one that all companies were charging for the trip, but I do not think he was told that the defendants were arranging for any other company to carry out the flight, at any rate in such a way as to indicate to him that they were agents only.

On July 11, Mr. Vickers, junior, again spoke to the defendants on the telephone, and this was followed by the letter of that date. I think it is clear from that letter that Airwork, Ltd., were holding themselves out as principals, and did thereby undertake liability as principals, and were the only persons with whom Mr. Vickers, senior, or his firm of Vickers, da Costa & Co., contracted. Inasmuch, however, as the deceased was only a guest of Mr. Vickers, and no party to the contract, in my view the question as to whether Airwork, Ltd., were principals or only agents is really immaterial; but the question was much debated during the trial, and, as this case will probably go higher, it is right that I should state my finding on this point.

A further point also arises on the contract. Mr. Roland Oliver argued that it was incumbent on Airwork, Ltd., to provide an aeroplane of their own, and one piloted by their own servant, or that alternatively the plane and pilot actually provided must be regarded as theirs. Here again, as the action does not concern a party to the contract, I think the point is really immaterial, but in my opinion the obligation of the defendants was to supply a competent pilot and a safe aeroplane and no more, and I do not think it matters whether the plane and pilot were theirs or some other company's. There was no suggestion that the first defendants had been selected owing to some particular trust which Mr. Vickers reposed in them, or that he or his son had any particular knowledge or particular preference for them. They could perform their contract by getting an equally competent firm to perform it for them. The difficulty in the way of the plaintiff, as against Airwork, Ltd., here is this. The deceased was no party to the contract. True it is that they had contracted to convey a party of seven, but their contract was not with all the members of the party, but with Mr. Vickers. No duty, therefore, *ex contractu* arose with the deceased. The duty to him arose because he was carried in the aeroplane, and that duty must be owed by the person who in fact carried him, that is to say, by the second defendants, who were the actual carriers. Mr. Roland Oliver argued that this case was brought within the doctrine of such well known cases as *Holliday v. National Telephone Co.* (2), *Penny v. Wimbledon Urban*

Council (3), and, more recently, *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.* (4), inviting me to hold that the first defendants had, so to speak, set in motion a dangerous operation, and that they were accordingly liable to all the world for any damage that might result. I do not think I can hold that arranging A for a journey by aeroplane is setting in motion a thing dangerous in itself. A risk attaches to an aeroplane flight as to a journey by motor car, or even by rail, but, in my opinion, the reasoning underlying the cases I have mentioned is wholly inapplicable to the present facts. I do not need to consider the question argued by Sir Stafford Cripps as to B whether the deceased was an invitee or a licensee, which, with all respect, I think does not arise, though if it did I should hesitate long before I held that a guest was not an invitee of the proprietor of an aeroplane who had agreed to carry a party of which he was a member. It was no concern of the deceased, as a guest of Mr. Vickers, who supplied the C aeroplane, or whose servant was the pilot. He had a right to expect that the plane would be fit and proper for the journey, and that the pilot would navigate it carefully. If the pilot was negligent, he, as the person to whom the deceased entrusted his safety, was guilty of a breach of duty, for which his employers are *prima facie* answerable, and, in my D judgment, no one else is. The action against Airwork, Ltd., therefore fails.

I have now to consider the position of the second defendants, and as I have found that the accident was caused by the negligence of their servant, they are liable unless they can escape owing to the conditions E incorporated in the charter, and on which they rely. One of the conditions exempts them from liability for their own or their servants' negligence. Here again the matter has to be considered from the point of view that the deceased was a guest. Now, it seems to me that if a person engages a means of conveyance for himself and his guests, and F the party who contracts to supply the conveyance stipulates that he is to be exempt from liability, or imposes any class of condition, the guest cannot be in any better position than his host, whether the owner of the vehicle knows guests are to be carried or not. The owner may G make what contract he likes, and, if it be said that the guest has a right to know of the exemption or conditions, it seems to me that it is for his host to inform him, and not for the owner of the vehicle, who probably knows nothing of him. The obligations of the owner cannot be increased H by the fact that the person with whom he has made his contract chooses to bring along persons who are in no contractual relation with the owner. The question, therefore, that I have to determine, as it seems to me, is whether or not Mr. Vickers was affected by the condition in question.

Now, the facts on this point are that Mr. Vickers, or his firm, made a

contract with the first defendants, and, even if they were only agents, the contract is contained in the letters they wrote on July 5 and 11. That contract, whether made by them as principal or agent, is entirely silent on the matter of conditions, nor does it seem to me to contemplate the execution of any further document, or that any further document is to be incorporated in the contract. True, they refer to the charter of an aeroplane and a charter flight, but I do not think an ordinary person reading those letters would contemplate that something in the nature of a charterparty was to be tendered at a later stage, containing further conditions of the contract. It would have been a simple matter to have stated, or, indeed, to have printed on their own notepaper, that all hirings were to be subject to conditions which would appear on a ticket or other document. I see no reason for holding that Mr. Vickers ought to have contemplated that the letters from the first defendants did not contain all the terms of the hiring, and, indeed, as the letters are silent on the subject of conditions, it was not open to the first defendants, without a breach of contract on their part, to add to or subtract from the open contract they had made, nor could they perform their contract by tendering a plane the pilot of which would not start on a journey except on the acceptance of terms and conditions which were no part of the original contract; but equally, if, when the plane arrived at the aerodrome, the pilot had said, "I am not going to start except upon the acceptance of certain conditions," the hirer could, of course, have refused to accept them and claimed his money back, and any damage he could prove; but if he gave way and started, he must be considered to have agreed to be bound by the conditions.

Now, what happened was this: The first defendants fixed the hire of the aeroplane with the second defendants certainly by July 13. No form of charter was submitted, or any further communication made, by either of the defendants before July 16, the day of the flight. As the party were getting into the plane, when, indeed, the guests were seated, the pilot handed to Mr. Vickers, junior, an envelope, saying: "Here is your ticket." The so-called ticket was in fact a document called a "Special Charter," addressed to Vickers, da Costa & Co., containing a description of the plane and details of the flight, price, and so on, and a variety of terms and conditions. The document contemplated signature by the "passenger," and a return of it when signed to one of the company's officials. Before young Mr. Vickers had any opportunity of seeing the contents of the envelope, the plane started and the disaster happened. On these facts, it seems to me impossible to hold that there had been a communication of the conditions to the hirer before the journey started, and an acceptance of them, express or implied, by him. Young Mr. Vickers said that he had travelled on one or two occasions by Imperial Airways, and received a ticket which he knew contained conditions;

but there seems to me to be a great difference between taking a ticket for an ordinary journey by an air-liner and the hiring of a special plane, so far as knowledge of the existence of conditions is concerned, especially when it is remembered that this contract had been fixed and concluded by correspondence with the first defendants, in which no reference to conditions appeared, several days earlier. A

No useful purpose would be served by reviewing the long line of authority to be found in the reports on these ticket cases, but I may refer to a passage in the judgment of SWIFT, J., in the case of *Nunan v. Southern Ry. Co.* (5) at p. 707, which was cited with approval by the Court of Appeal in the case of *Thompson v. London Midland & Scottish Ry. Co.* (6). The learned judge said : B

I am of opinion that the proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form, stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him. C

Here, the documents forming the contract are silent as to any terms other than the price and the time to be occupied in flying over the Review area, and nothing was done by the sub-contractors here, who were carrying out the contract for the first defendants, who were, in my judgment, the contracting parties, or, at any rate, the principals of the second defendants, to bring it to the mind of the hirer that they would only start on the journey if further terms were agreed upon. Consequently, in my opinion, they cannot rely on this condition, and the plaintiff is accordingly entitled to judgment against the second defendants. D E

The damages necessarily must be heavy, and it has caused me a good deal of anxiety to come to a conclusion as to the proper amount to award. In losing a husband and father in the early prime of life, with the further expectation of life of some 30 years, in a good position which had excellent prospects of improvement, the plaintiff and her daughters have suffered a grievous injury. On full consideration, I have come to the conclusion that a fair sum to award is £10,000, and for that sum, together with the sum of £25 16s. 6d. claimed for funeral expenses, I give judgment against the second defendants, with costs. F

Solicitors : *Hyman Isaacs, Lewis & Mills* (for the plaintiff) ; *Linklaters & Paines* (for the first defendants) ; *Glover, Scott & Apthorpe Webb* (for the second defendants). G H

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

BARBER v. PIGDEN.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.), November 18, 19, December 18, 1936.]

A *Husband and Wife—Liability of husband—Wife's tort—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), ss. 3, 4 (1) (b).*
Libel and Slander—Award—Several allegations on separate occasions—Single verdict—Validity—Publication—Agency—Evidence.

B In an action for slander against a husband and wife, it was alleged that the wife had on several occasions made separate and distinct imputations on the plaintiff's chastity, and further that the wife had acted as her husband's agent. The slanders were uttered in the presence of the husband, and on one occasion the husband on being asked: "We know all about the Barbers, don't we?" had answered "Yes, we do." The slanders were all uttered before the Law Reform (Married Women and Tortfeasors) Act, 1935, came into operation. At the trial, it was held that the slanders had been spoken by the wife, and that she had acted as her husband's agent, one
 C verdict being given for the several slanders, without any protest by the defendants' counsel. On appeal the defendants contended: (i) that there should have been a separate verdict for each cause of action, and (ii) that there was no evidence that the wife had acted as her husband's agent. The plaintiff contended that the Law Reform (Married Women and Tortfeasors) Act, 1935, did not affect causes of
 D action which had accrued before the Act came into operation, and that the husband was therefore liable, apart from the question of agency, for his wife's torts:—

HELD: (i) there was no evidence fit to go to the jury that the wife had uttered the slanders as her husband's agent.

E (ii) as the defendants' counsel at the trial had not asked for a separate verdict in respect of each cause of action, the defendants were debarred from raising the point at the hearing of the appeal.

(iii) the Law Reform (Married Women and Tortfeasors) Act, 1935, is retrospective, and a husband is no longer liable for his wife's torts whenever committed, except where legal proceedings have been started before the Act came into operation.

F [EDITORIAL NOTE. The Law Reform (Married Women and Tortfeasors) Act, 1935, is here held to be retrospective, and the husband is immune from liability except in cases where proceedings were commenced before the Act came into operation. The question of the wife acting as the husband's agent is, of course, new, since previously the husband was liable in any event, and owing to the close relationship, the question of sufficiency of evidence of agency is one of some nicety.

G AS TO LIABILITY OF HUSBAND FOR LIBEL BY WIFE, see HALSBURY, Hailsham Edn., Vol. 20, p. 395, para. 482; and FOR CASES, see DIGEST, Vol. 27, pp. 213-215, Nos. 1847-1866.]

Cases referred to:

(1) *Weber v. Birkett*, [1925] 2 K.B. 152; 32 Digest 176, 2174

H (2) *Ne vill v. Fine Art & General Insurance Co.*, [1897] A.C. 68; 32 Digest 154, 1868.

(3) *Seaton v. Burnand*, [1900] A.C. 135; 29 Digest 49, 117.

(4) *Weiser v. Segar* (No. 2) (1904), 48 Sol. Jo. 457; 35 Digest 67, 631.

(5) *James Tucker S.S. Co. v. Lamport & Holt* (1906), 23 T.L.R. 10; Digest, Practice, 483, 1625.

- (6) *Powell v. Vickers, Sons & Maxim, Ltd.*, [1907] 1 K.B. 71; Digest, Practice, 874, 4157.
- (7) *Benning v. Ilford Gas Co.*, [1907] 2 K.B. 290; Digest, Practice, 874, 4158.
- (8) *Steele v. Belfast Corpn.*, [1920] 2 I.R. 125; 36 Digest 85, 565 xxxvii.
- (9) *Martin v. Benson*, [1927] 1 K.B. 771; Digest Supp.
- (10) *Watkin v. Hall* (1868), L.R. 3 Q.B. 396; 32 Digest 96, 1272.
- (11) *Kinnell v. Walker* (1911), 27 T.L.R. 257; Digest, Practice, 892, 4340.
- (12) *Croxford v. Universal Insurance Co., Ltd.*, *Norman v. Gresham Fire & Accident Insurance Society, Ltd.*, [1936] 1 All E.R. 151; Digest Supp.

APPEAL from a decision of TALBOT, J., dated Mar. 17, 1936.

This was an action for slander brought against a husband and wife under a writ issued on Aug. 16, 1935. The plaintiff alleged that the female defendant had made imputations on her chastity upon several occasions during 1934 and in April and May, 1935. It was further alleged that the female defendant was acting as her husband's agent. The jury found one verdict on all counts against both defendants.

Both defendants appealed.

T. W. C. Carthew, K.C., and *A. A. Pereira* for the appellants.

G. O. Slade, for the respondent.

Carthew, K.C.: This cannot be a valid verdict; there was only one verdict for several distinct causes of action. See *Weber v. Birkett* (1); *Nevill v. Fine Art & General Insurance Co.* (2); *Weiser v. Segar* (No. 2) (4); and *Steele v. Belfast Corporation* (8). It is submitted that there was no case to go to the jury in respect of the male defendant. The law of principal and agent must apply to joint tortfeasors. Mere silence, or neglect on his part to deny, will not make him liable. Since the new Act, a husband is in no different position *vis-à-vis* his wife from that in which he is to anyone else.

Pereira, following on the same side: It should not be taken against the defendants too seriously that their counsel did not ask at the trial for separate questions against each defendant to be put to the jury.

Slade: *Weber v. Birkett* (1) is only an authority for the proposition that if there are two *genera* of causes of action, then it will not do to have only one verdict. In this case, all the causes of action were slanders; it could only affect a payment into court; a defendant who does that is bound to assign a payment in respect of a specified cause of action. See *R.S.C., Ord. 22, r. 1* (2); *Martin v. Benson* (9); *Watkin v. Hall* (10); and *Kinnell v. Walker* (11). If the verdict is not inherently bad, then it is submitted that, as the questions were put to the jury without any objection being taken, the point cannot be raised now. There was evidence from which the conclusion could be drawn that the husband concurred in, or authorised, the publication of the slanders. All the publications occurred before the 1935 Act was passed; the husband would have been jointly liable except for that Act; to avoid liability, he must show that there is something in the Act which avoids rights that

had accrued before the date of the Act. There is a saving only for torts not only committed before, but also sued for before, the passing of the Act. Statutes are construed so as not to destroy already existing rights, unless it is expressly stated to the contrary in the statute. [Counsel also referred to *Croxford v. Universal Insurance Co., Ltd.*, *Norman v. Gresham Fire & Accident Insurance Society, Ltd.* (12).]

Carthew, K.C., in reply: Here the defamations complained of were not the same; they were different causes of action.

GREER, L.J.: This is an appeal from the judgment of TALBOT, J., in an action brought by Mrs. Barber against Mr. and Mrs. Pigden under the Slander of Women Act, 1891, which enacts that words spoken and published after the passing of the Act which impute unchastity or adultery to any woman shall not require special damage to render them actionable. The result of this statute was that to impute unchastity to a woman became a tort for which she could bring an action for damages and obtain damages without proof of actual damage. At that time, and until an Act was passed in 1935, a husband was liable to be sued for damages arising from torts or wrongs committed by his wife. In the case under appeal, it was not and could not be in dispute that the words which the jury found to have been spoken by Mrs. Pigden were such as to impute unchastity or adultery to the plaintiff. Several questions arose for determination by the judge at the trial. It was alleged on behalf of the male defendant that his liability to be sued for the slander was terminated by the Law Reform (Married Women and Tortfeasors) Act, 1935, ss. 3, 4. Sect. 3 is in the following words:

Subject to the provisions of this part of this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable—(a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation.

By sect. 4, it was provided that nothing in Part I of the Act, which is the part material for consideration in the present appeal, should affect any legal proceedings in respect of any tort if proceedings had been instituted in respect thereof before the passing of the Act. It appears to have been considered by the counsel on both sides until a late period in the argument in this court that the statute last referred to applied retrospectively to liability arising out of torts committed by a wife before the passing of the Act of 1935. It was therefore argued before the trial judge that there was evidence to go to the jury that the female defendant was authorised to make the actionable slander as agent for the male defendant. The defendants on the other hand contended that there was no evidence of such agency fit to be left to the jury, and that the judge ought to have so determined at the end of the plaintiff's case. It was

secondly contended on behalf of the appellants that as there were two distinct slanders published on two separate occasions to different persons, there ought to have been a finding by the jury of separate damages in respect of each cause of action, and that inasmuch as the jury awarded one sum, namely £300, in respect of both of these two slanders, the verdict was a nullity, and no judgment could be entered in respect of it. The first argument was only concerned with the case in so far as it resulted in a judgment against the male defendant, but both defendants contended that as there was no verdict there could be no judgment against either. I have come to the conclusion that the learned judge was wrong in leaving the question of agency to the jury. The statement of claim alleged the publication of the slanderous words on repeated occasions throughout the month of Apr., 1935, to a Mrs. Beaumont, a publication during the first fortnight of May, 1935, to Mrs. Beaumont, to a Mr. and Mrs. Payne, and to a Mr. Eastwood, and thirdly a publication in Sept., 1934, to a Mrs. Corke, at least three separate publications, and possibly more. At the hearing, Mrs. Corke was called first, and said the female defendant uttered in her presence the defamatory words many times, and she said that on one day the male defendant was present and told his wife to "shut up." Another time he was present but did not seem to take any notice, and he was present several times when the female defendant repeated the slanders, and she adds, "I think he said he had got fed up with telling her to stop it." In cross-examination, she said that the husband was present sometimes, but seemed to be fed up with it, "she was not easy to shut up." With regard to another publication of similar defamatory words in 1935, Mrs. Beaumont spoke to the alleged slander having been uttered by Mrs. Pigden in the presence of her husband the male defendant. On this occasion she does not say that the male defendant said anything. Speaking of what happened on Apr. 29, she says she cannot remember the male defendant being there when the slanderous words were uttered. She also gave evidence that on May 2 or 3, 1935, the female defendant published similar defamatory words to her, Mrs. Payne, and to Eastwood, and that, after she had uttered the slander, Eastwood said, "We know all about the Barbers, don't we, Arthur?", meaning thereby the male defendant. The male defendant then answered, "Yes, we do." A witness called Funnell was also called. He said he remembered Mrs. Pigden saying in her husband's presence about May, 1935, "We are out to paint Barber black before we leave." He did not remember the male defendant saying anything then. He said also that he remembered Mrs. Pigden speaking of the plaintiff in the presence of the male defendant words which meant the same thing as those which had been spoken to by the other witnesses. As soon as she said it, the male defendant said, "That's enough of that." It seems to me on this evidence, as recorded in the judge's note, as amended from counsel's notes,

that there was no evidence to go to the jury that any of these slanders were spoken by the wife as the husband's agent, or with his authority. In so far as the case depended on making out a case of agency, it entirely failed, and the case as against the male defendant should not have been left to the jury.

On the question as to whether the appellants can complain that the verdict is not a valid one because separate damages were not awarded in respect of each publication of the same slander, reliance was placed by the appellants' counsel on the decision of the Court of Appeal in *Weber v. Birkett* (1). In that case the decision of the court is correctly stated in the headnote in these words :

The plaintiff sued the defendant for a slander and for a libel. The defendant pleaded an apology, and paid into court two sums of £105 each, one in respect of the slander and the other in respect of the libel. The jury returned a verdict for a lump sum of £200 to cover both causes of action :—HELD : that that was no verdict, and that no judgment could be entered upon it for either party.

In the Court of King's Bench *Weber v. Birkett* (1) was tried before LORD HEWART, L.C.J., and a jury. LORD HEWART, L.C.J., held that there was no verdict because the two causes of action were of a different genus, namely, one was slander and the other was libel. In giving judgment in the Court of Appeal, BANKES, L.J., said at p. 154 :

The action was brought to recover damages for a slander, and also for a libel, two quite distinct causes of action. I think it only leads to confusion to call attention to the fact that the nature of the defamation was the same in both. That does not make them any the less distinct causes of action.

It seems to me that the causes of action for the several publications of defamatory words in 1934 to Mrs. Corke constitute causes of action quite distinct from the several publications of the same defamatory statement to other people in 1935, and that on this ground also there was, as in *Weber v. Birkett* (1), no verdict in respect of which judgment could be entered, unless it can be said that the defendant is disentitled to rely upon this point because she did not ask the judge to leave the questions separately to the jury. It would have caused very considerable inconvenience if the judge in this case had been asked to direct the jury to treat each occasion on which the defamatory words were published by the female defendant as a separate cause of action, and to say what the damages should be in respect of each of the numerous occasions on which she was proved to have repeated the slander. I can quite understand why the defendants' counsel did not ask the judge to take this inconvenient course, but as he stood by and without protest or question allowed the judge to ask the jury to give one verdict in respect of all the occasions on which the defamatory words were spoken, he is, in my judgment, disentitled to take the point that the judge could not act upon the verdict on this ground. I think we ought to act upon the principle

enunciated by LORD HALSBURY, L.C., in *Nevill v. Fine Art & General Insurance Co.* (2), where in the course of his speech he said, at p. 76 :

where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no court would ever have granted you a new trial ; for the obvious reason that, if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect. A

The same learned Lord in the case of *Seaton v. Burnand* (3) gave expression to the same views.

At first sight the case of *Weiser v. Segar* (No. 2) (4) seems inconsistent B with the views quoted from the speech of LORD HALSBURY, L.C., but I do not think the question with which VAUGHAN WILLIAMS, L.J., dealt in that case was similar to the question presented by the present case. In the case under appeal, it must have been quite obvious to counsel for the defendants that the judge was leaving to the jury all the publications C of the slander as if they gave rise only to one cause of action. They may well have thought that this was, from the point of view of their clients, a more convenient and satisfactory way of dealing with the case than splitting it up into several causes of action and asking for a separate award of damages in respect of each. For these reasons, I think the D defendants have disentitled themselves to take this second point, and that if this were the only point to be considered the appeal would fail. Further, the trial judge was not asked to take the verdict of the jury as to what their verdict would be in reference to each of the alleged slanders separately. It seems to me that the case is within R.S.C., Ord. 39, E r. 6, and in my opinion there was no miscarriage of justice thereby occasioned. This affords an additional reason why a new trial of the action against the female defendant should not be ordered.

It remains for me to deal with the most important question which was argued in the appeal, that is to say, does the statute of 1935 relieve F husbands from their liability for their wives' torts whenever committed, or does such relief apply only to torts committed after the date of the statute. This is a difficult question as regards liability for torts. If sect. 3 (a) had to be construed without any assistance from sect. 3 (b) and sect. 4, it would probably have to be construed as not retrospective. G But sects. 3 (b) and 4 (1) (b) seem to me inconsistent with such a construction, because if sect. 3 applied only to torts committed after Aug. 2, 1935, when the statute came into operation, it would have been quite unnecessary to provide that the Act should not affect any legal proceedings in respect of any tort if proceedings had been instituted in respect thereof H before the passing of the Act, because, in the event referred to, the husband would not have been liable in any case, whether proceedings had or had not been commenced, because the tort relied upon in any proceedings instituted before the passing of the Act must necessarily

have been a tort committed before the passing of the Act. Notwithstanding the strong presumption against construing statutes as retrospective, I cannot resist the conclusion that, by reason of the words used in sect. 3 (b) and sect. 4 (1) (b), this statute ought to be construed as putting an end to the liability of the husband for his wife's torts whenever committed, unless legal proceedings had been started before the passing of the Act. It is hardly necessary for me to say that I accept the law as laid down in MAXWELL ON THE INTERPRETATION OF STATUTES, 7th Edn., p. 186, where it is stated that statutes :

A
B are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended.

This is a firmly established rule, and it would be pedantic to refer to the many cases in which it has been laid down, but I have been forced to the conclusion that sects. 3 (b) and 4 (1) (b) show that a retrospective effect was clearly intended. The respondents' contention on this point fails.

C
D On the ground that there was no evidence of agency fit to be left to the jury, the appeal of the male defendant will be allowed with costs, but as the female defendant has failed on the only point that has been argued on her behalf, her appeal will be dismissed with costs.

SCOTT, L.J. : The words of the alleged slanders of the plaintiff are set out in para. 2 (a), (b) and (c) of the amended statement of claim. Although they have a generic similarity, in that all impute unchastity, they are, legally speaking, wholly and entirely separate causes of action ; and further in (c) an additional and particular slander affecting the paternity of the plaintiff's son is alleged. In every case all the words set out are alleged to have been uttered by the female defendant and by her alone. The only allegation against the male defendant is (a) that he was present and heard his wife, and (b) that he *caused* her to speak and publish the words set out in those three subparagraphs. In para. 3 it is further alleged that he " caused the female defendant to speak and publish " the particular words alleged in para. 2 (c) on repeated occasions in the previous twelve months : but this is an insufficient pleading of a slander in that the actual words are not set out, and I disregard it. The allegation, that the words were uttered in the presence and hearing of the male defendant, can have no place in a statement of claim for slander, except as an allegation of publication to him, and may be disregarded—of course, without prejudice to evidence of the fact if relevant for purposes of proof. The addition that he " caused " her to publish the words is presumably to be construed as alleging a joint tort. Agency of the wife for the husband not being alleged, I do not think that, as the statement of claim stood before delivery of particulars, it disclosed any cause of action against the husband, except in the allegation that he " caused "

her to utter such slander, with the result that both would be joint tortfeasors. The defendants might have asked for particulars of how, etc., the husband had so *caused* the wife to do it; but no such request was made, and, on the correspondence which passed between the solicitors to the parties, it is plain that the defendants' solicitors treated the statement of claim as intended only to allege authority to the wife from the husband to do what she did. This being so, we must treat the liability of the husband as depending on (a) adequate allegations in the further and better particulars of (i) antecedent authority from the husband to the wife, or (ii) her *purporting* to speak for him as well as herself, coupled with allegations of contemporaneous or subsequent ratification by the husband, and (b) adequate proof of such allegations. A B

No allegation of express authority is made in the further and better particulars, but only of an authority to be inferred from certain facts, viz., (a) that the husband, though present on all the occasions of the said publications, did not dissent from any; (b) that the wife in his presence spoke and published the two slanders upon the deceased Mr. Barber which had been struck out from the original statement of claim when he elected to drop out; and (c) that on the last mentioned occasion he had added the words "Oh yes, that is right." Of these allegations of implied authority, (c) is the only one which could, properly speaking, stand; the defendants could have had the others struck out as irrelevant and embarrassing; but they did not do so. On Mar. 7, 1936, the plaintiffs' solicitor by letter added a further paragraph to their previous particulars of authority; it was that on the occasion of the slander alleged in para. 2 (b) of the statement of claim the Mr. Eastwood there mentioned had said to the male defendant "Oh yes, we know all about the Barbers, don't we, Arthur?" and that the latter had replied, "Yes, we do." All allegations were denied in each defence. On these pleadings the case came to trial before TALBOT, J., and a common jury on Mar. 16 and 17, 1936. C D E F

The Law Reform (Married Women and Tortfeasors) Act, 1935, came into force on Aug. 2, 1935, which was a fortnight before the issue of the writ in this action. The effect of the Act I will discuss later.

The slanders of the plaintiff by the female defendant were amply proved, and counsel for the appellants made no point before us upon that aspect of the trial. The questions raised on the appeal concerned (i) the form of the judgment, (ii) the submissions of the defendants' counsel, both before and after the evidence for the defendants, that there was no case to go to the jury as against the male defendant, and (iii) the interpretation of the new Act. At the trial, the first two witnesses, Mr. and Mrs. Corke, gave evidence as to the earliest slanders, viz., those alleged, in paras. 2 (c) and 3 of the statement of claim, to have been spoken and published in Sept., 1933, to Sept., 1934, to Mrs. Corke. G H

Incidentally, Mrs. Corke admitted that the male defendant had told his wife to "shut up," and "seemed to be fed up with" his wife's slanders of the plaintiff. There was no evidence of authority in any answer of these two witnesses. It should be noted that neither witness said a word about any slander by the female defendant of the plaintiff's deceased husband. The next witness was the Mrs. Beaumont to whom the slanders in para. 2 (a) and (b) of Apr. and May, 1935, are alleged to have been published. She gave evidence—apparently without objection from the defendant's counsel—of the slander of the deceased Mr. Barber alleged in the part of para. 2 (a) which had been struck out when he elected to drop out of the action. She also proved the words alleged in the supplementary particulars (contained in the letter of Mar. 7, 1936, to which I have referred) to have been uttered by the male defendant: "Yes, we do." I do not think the words in answer to the question from Eastwood, "We know all about the Barbers, don't we, Arthur?" constitute any evidence whatever of authority to his wife to impute unchastity to Mrs. Barber. The next witness, Mr. Beaumont gave no evidence which touches the issue of authority. Funnell (the person to whom the slander of the deceased Mr. Barber was alleged, in the deleted subpara. (d) of the statement of claim, to have been published) gave evidence of slanders by the female defendant of the late Mr. Barber which I do not think ought to have been allowed; at most the conversations were only admissible as part of the *res gestæ*. It is, however, to be noted that this witness, like Mrs. Corke, said that the male defendant had tried to stop his wife slandering the plaintiff. This was the whole of the evidence given on the issue of authority. Counsel for the defendants submitted there was none, but the learned judge preferred to put him to his election to stand by that submission or to call his evidence, and he chose the latter. The female defendant was called first, denied the slanders, and swore that the whole of the evidence given by the witnesses for the plaintiff to whom I have referred was untrue. The jury were obviously justified in disbelieving her. The male defendant was evidently also disbelieved by the jury in so far as he corroborated his wife's denials of the slanders. He admitted in cross-examination that he thought he had been "twisted" by Mr. Barber, and that there had been "a few words over the house," i.e., about the transaction over which he thought he had been "twisted." There was no other evidence bearing on the question of authority. We were given to understand that, in his opening and closing addresses to the jury, counsel for the plaintiff had urged that the two defendants had conducted a "campaign" against Mr. and Mrs. Barber—I presume of revenge for the "twisting." I can see no evidence whatever of any hostilities by the male defendant, and do not think that a description of the evidence which was going to be, and still less which had been,

given, as a "campaign" was justified. We were given a copy of the note taken by junior counsel for the defendants of the learned judge's summing up. The passage about authority was in these words :

Authority would not be satisfied merely by the fact that the husband knew that these stories were being told by the wife. You must be satisfied that there was this campaign. . . . I think it is impossible to say there was no evidence, but you have the important fact that on every occasion where anything definite was said by her before him, he did something to check her. Authority must be something in the nature of active authority. A

With the first and last sentences I respectfully agree ; but I cannot think that the first part about the supposed "campaign" was a sufficient or a proper direction. The word "campaign" was a mere metaphor, and, as applied to the question of proof of authority, a dangerously misleading one. That the female defendant had conducted an increasing succession of defamatory attacks on both the Barbers justified the metaphor against her, but was *nihil ad rem* on the issue of her agency for her husband. Nor was the fact that the male defendant thought he had been "twisted" any evidence that he had also in fact condescended to attack Mrs. Barber by accusing her of unchastity. But the word "campaign" almost invited the jury to assume that once they were satisfied that the male defendant felt injured, they might draw the further inference that he had not only given way to resentment and joined in "a campaign," but had adopted a quite dreadful form of vicarious attack. I am bound to hold that a clearer direction was required. I agree with the learned judge that the unchallenged evidence as to the unvarying endeavour of the male defendant to check his turbulent wife in her "campaign" tended to show that she had no authority from him to conduct it, and still less to use poison-gas in its furtherance ; but I go further : I think that the jury should have been directed to find a verdict for the male defendant on the ground that there was no real evidence that he had either caused or authorised his wife so to defame the plaintiff. C D E F

There is, however, a further question, a question of pure law. Mr. Slade, for the plaintiff, submits that the male defendant is none the less liable on the ground that the old common law rule of liability of the husband for the torts of the wife still applies to the torts of a wife committed before Aug. 2, 1935, the date when the new Act first came into effect. Sect. 3 is in the following terms : G

Subject to the provisions of this part of this Act, the husband of a married woman shall not, by reason only of his being her husband, be liable—(a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage ; or (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation. H

Prima facie, the male defendant is protected from his old common law liability by both (a) and (b) of the above section. But Mr. Slade sub-

mitted that, in the absence of express words saying that these provisions are both to apply to torts committed *before* the coming into effect of the Act, they should be construed as restricted to torts committed *after* that date. He based his submission on the canon of statute interpretation that unless you can collect from the language of the statute a clear intention to give it a retrospective operation, even to the extent of taking away vested rights, you must read it as applying only to the future. He then addressed to us a forcible argument to this effect: (i) sect. 3 (a) does not say "whether before or after the passage of this Act"; (ii) nothing short of words to that effect will suffice to take away accrued rights; especially as these words could so easily have been added. Parliament had so intended; (iii) that Parliament had the subject of retrospective operation well in mind, and expressed itself unambiguously when it intended to say anything which would make the question of dates material, is clearly shown by sect. 4 (1) (b):

Nothing in this part of this Act shall . . . affect any legal proceeding in respect of any tort if proceedings had been instituted in respect thereof before the passing of this Act.

Therefore, says Mr. Slade: (iv) it would be wrong to attribute retrospective effect to sect. 3. I do not, however, think this argument is sound. The language of Part I discloses an intention to make a clean sweep of the old legal fiction of our common law that a woman on marrying became merged in the personality of her husband, and ceased to be a fully qualified and separate human person. The draftsmanship of the Act does indeed seem to the lawyer a little open to criticism—and possibly even to more criticism than my common law mind is likely to discern on a first consideration—particularly in regard to the difficult task of connecting the Act up with the retained parts of the 1882 Act; at any rate, SIR ARTHUR UNDERHILL's delicious little book on the Act raises a good many points which call for reflection. But as far as the present case is concerned, the dominant intention of the Act is clear beyond all doubt: it is to effect a drastic reform of our law in a branch where there has been too much legal fiction and too much technicality of legal procedure; and I do not think the rule against retrospective interpretation, on which Mr. Slade relies, is properly applicable to such a statute abolishing legal fictions any more than to a merely procedural statute. The purpose of Part I of the Act is to give back to woman, though married, the full human status allowed by the common law to a man, a maiden, or a widow, of which the common law had robbed her; in short, it restores to her her natural status and capacity. It does it by sweeping away a host of legal fictions—fictions which in origin were inextricably mixed up with old procedural law. It is well recognised that the canon against retrospective interpretation does not apply to a statute dealing with adjective law, *i.e.*, procedure,

and I think that a statute abolishing old legal fictions is so nearly akin to a procedural statute that the canon can have little, if any, application. After all, the canon expresses no rigid or absolute rule. It rests on a presumption of common sense in a well ordered and civilised society; and that presumption does not seem germane to the root and branch view Parliament was obviously taking, when it passed this Act, of the historical interferences by lawyers with the natural rights of woman. Anyhow, the inhibition of the rule is a matter of degree, and must vary *secundum materiam*. A little consideration of this statute in my view suffices to exclude the presumption altogether. (i) The dominant enactment is contained in sect. 1. Sects. 2, 3, and 4, are in essence consequential on sect. 1, and must therefore be construed in the light of sect. 1. (ii) Sect. 1 obviously calls for a liberal and broad application: why not sect. 3 also? (iii) Where it was intended to impose upon the operation of the statute limitations of date, Parliament did it in express words. There are several references to limiting dates in sects. 2 and 4, but none in sect. 3. (iv) The express provision in sect. 4 (1) (b), upon which Mr. Slade relied, leads, in my opinion, to precisely the opposite inference to that which he invited us to draw. Sect. 3 (b) provides that (subject to other provisions in the Act) a husband shall not, by reason only of his being her husband, be liable to be sued in respect of any tort committed by her at any time; but that is subject to sect. 4 (1) (b), which creates one exception, viz., where the "proceeding" in which the husband is being sued for a tort of his wife's was instituted before the passing of the Act. But to that express exception the canon of interpretation contained in the maxim *expressio unius, exclusio alterius* is surely applicable; where the expressed exception is inapplicable, there is no room to imply any other, and consequently sect. 3 must apply to every action started after Aug. 2, 1935. I therefore decide that the old common law rule is not available to the plaintiff in this action so as to create a cause of action against the male defendant, and as, if I am right in what I have already said, there is no other ground of liability, he is entitled to judgment.

There is, however, one other matter to be considered—a submission on behalf of the female defendant that there was a defect in the verdict and consequent judgment entered below, which entitles her to a new trial. It arises in this way: There were in the statement of claim three specific and properly pleaded slanders, each quite separate from the other in regard to the words which were uttered, to the occasions when they were uttered, and to the persons to whom they were published. For the purpose of discussing this last point, I disregard entirely the allegations in the statement of claim that there were other slanders, the words of which are not set out as they ought to have been, and limit myself to the three which were sufficiently alleged. Each of these three consti-

tuted a separate cause of action, and it was contended before us that each of these called for a separate verdict and separate judgment. Very scanty information was available to us of any discussions which took place between counsel and judge at the end of counsel's speeches, and before the summing-up, or after it and before judgment; in fact, the passage I have already quoted from counsel's note is all we know even of the summing-up, except that the learned judge did not direct the jury to find a separate verdict on each of the three slanders, with a separate sum of damages upon each slander for which they returned a verdict for the plaintiff, but left them free to give a lump sum verdict covering the whole statement of claim. The defendants' counsel, as I have already said, submitted that there was no evidence to go to the jury against the male defendant; but he admitted that he took no objection to the summing-up. The jury responded by returning a single verdict of £300. The learned judge thereupon, without objection from the defendants, entered judgment for that sum. Thus no objection was taken to the validity either of the verdict or of the judgment.

Before us, however, Mr. Carthew submitted for both appellants that this procedure was wholly out of order, and so much so that there was in law no verdict and no judgment. He relied upon the case of *Weber v. Birkett* (1), and in particular on the observations of BANKES, L.J., at p. 154. The decision in that case was that the absence of separate judgments on the two causes of action sued on made it impossible to give the defendant the advantage to which he was entitled of his two separate payments into court, one in respect of the slander and the other in respect of a libel. LORD HEWART, L.C.J., indeed, had refused to enter judgment, holding that a verdict covering both causes of action in one figure was no verdict. BANKES, L.J., on p. 156, agreed with the view taken by LORD HEWART, L.C.J., that there was no verdict. SCRUTTON, L.J., said, at p. 157:

I think the jury failed to find a verdict on the different issues on which it was necessary for them to find, and therefore the verdict was no verdict.

ATKIN, L.J., said, at p. 157:

When once the jury were discharged without coming to a verdict on the issues joined between the parties, it seemed to me that the learned judge could not have acted otherwise than as he did.

I think that all the Lords Justices had the issue of payment into court primarily in mind; but ATKIN, L.J., expresses himself in language which rather reads as if, in addition, he were thinking of the question of verdict and judgment in relation to the underlying issues of liability on the causes of action; and Mr. Carthew relied upon the decision, or at any rate upon the opinions expressed, as authority for the proposition that where two or more causes of action are joined in one writ there must, *ex debito justitiæ*, be separate verdicts and judgments. In order to see

what is the real meaning of the relevant passages in the judgments, it is necessary to look back a little to get the true historical perspective. Under the Common Law Procedure Act, 1852, ss. 70-73, it was necessary for a defendant, if he paid money into court in satisfaction of part of the plaintiff's claim, to specify the cause of action in respect of which it was paid in. The issue was then raised as to whether or not the sum paid into court was sufficient to satisfy the plaintiff's claim, and, if that issue were found for the defendant, he was entitled to judgment and his costs. Consequently, where two causes of action were joined in one suit, as they could be under the Common Law Procedure Act, 1825, s. 41, and money was paid into court in satisfaction of one or each of them, the express terms of the statute required that a verdict should be found in respect of each of the causes of action, in order that judgment might be given in accordance with the Act. When the Judicature Act was passed, this specific statutory provision disappeared; but the requirement, in regard to payment into court, that a defendant should state the cause of action in respect of which his payment-in was made, re-appeared in R.S.C., Ord. 22, r. 2, which, until its amendment in 1933, was in the following form:

Payment into court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein. Consequently, under the rule in that form, a payment into court which did not specify in respect of which, of several causes of action joined in the same writ, it was paid in, was a bad plea: see *James Tucker S.S. Co. v. Lamport & Holt* (5), where the judgment of COZENS-HARDY, L.J., is very explicit. It is important to note, as was pointed out by the Court of Appeal in *Powell v. Vickers, Sons & Maxim, Ltd.* (6), that, in spite of the Common Law Procedure Act having been repealed, the rule that the defendant would be entitled to his costs (although no longer to his judgment) ought still to be applied by the court. It is clear from the judgment of BANKES, L.J.—which was the only long judgment given in *Weber v. Birkett* (1)—that his mind was directed entirely to the position which arose from the fact that in that case there had been a payment into court. It is quite true that at one stage he says “in my opinion that was no verdict at all,” but in his very next sentence he draws attention to an argument which was addressed to him that the defect could be cured by an amendment to the defence, saying that the sum paid in was paid in generally in respect of both of the causes of action. In dismissing that argument he does so, not on the ground that nothing could make what was “no verdict at all” into a verdict, but upon the technical ground, based on the existing old form of R.S.C., Ord. 22, r. 2, that an amendment paying a sum of money in generally in respect of two causes of action would be a bad plea. When he says “there was no verdict at all,” he is only saying it was not a verdict which, having

regard to the issues raised between the parties on the pleadings as a result of the payment into court, disposed of the case. Further, it is to be observed that in discussing the judgment of DARLING, J., in *Benning v. Ilford Gas Co.* (7), where a lump sum was paid into court
A in respect of several causes, BANKES, L.J., does say *obiter*, at p. 156 :

It may be that the court were right in dismissing the appeal, having regard to the fact that the plaintiffs allowed the case to go to trial without taking any objection to the payment into court.

That observation is not consistent with the view that the absence of
B a separate verdict on each of several causes of action included in a statement of claim made the trial a nullity. It is, however, consistent with the view that a single verdict may validly dispose of an action in which several causes of action are alleged, unless the parties by their pleadings or their conduct of the action have rendered it essential that
C there should be more than one verdict in order that justice between the parties may be done.

The judgment of SCRUTTON, L.J., in *Weber v. Birkett* (1) is very short. He, too, had the question of payment into court primarily in mind. The judgment of ATKIN, L.J., must, I think, be read in the light of what the
D Court of Appeal said in *Powell's* case (6), viz., that wherever money is paid into court with a denial of liability :

there are two distinct issues raised, namely (a) whether the defendant is under any liability to the plaintiff ; and (b) whether the sum paid in is sufficient to cover the liability ; .

E whilst where money is paid in in satisfaction of the claim without such denial, the only issue joined between the parties is whether or not the sum paid in is sufficient to satisfy the liability. As already pointed out, under the form of R.S.C., Ord. 22, r. 2, at that time, the sum had to be allocated to specific causes of action, so that " the issues joined between
F the parties," to which ATKIN, L.J., refers in his judgment, were issues which arose from the fact of payment into court, and his judgment does not necessarily apply to a case where no money has been paid in.

Apart from *Weber v. Birkett* (1), which is, for the reasons I have given, distinguishable, and does not govern our decision, I can see nothing in
G the Judicature Act or Rules of the Supreme Court as they are to-day to make separate verdicts and judgments invariably necessary in respect of separate causes of action contained in the same writ. Indeed, R.S.C., Ord. 22, r. 1 (2), as it is now worded, expressly contemplates the court or a judge having power to allow a payment into court in respect of
H more than one cause of action. The result is that the question of whether one or more causes of action are to be included in one verdict or judgment will depend upon the exercise of the trial judge's judicial discretion upon all the circumstances of the case.

It is worthy of note that in this particular case, the plaintiff, having

chosen to join separate causes of action in one statement of claim, asked, not for separate damages in respect of each slander, but for general damages in respect of all the slanders. The jury gave her damages in the manner in which she had prayed for them, i.e., generally in respect of all the slanders. In the absence of any protest by counsel for the A defendants at the trial, I do not think it is open to the defendants or either of them to complain now. I cannot see that they thereby suffered any hardship in fact; but in any event the right to object, if any, was lost by waiver.

In the result, I agree with GREER, L.J., in the whole of his judgment. B

GREER, L.J.: EVE, J., has read the judgments which have just been delivered, and agrees with their conclusions, for the reasons stated in those judgments. The result will be that the appeal will be allowed, with costs both here and at the trial as regards the male defendant, and C as regards the female defendant the appeal will be dismissed with costs.

Appeal allowed with costs as regards the male defendant and dismissed with costs as regards the female defendant.

Solicitors: W. A. Jennings (for the appellants); Cosmo Cran & Co. (for the respondent). D

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re HAMER'S ESTATE, PUBLIC TRUSTEE v. ATTORNEY-GENERAL. E

[CHANCERY DIVISION (Bennett, J.), December 16, 17, 1936.]

Bastardy—Presumption of legitimacy—Birth certificate—Rebutting evidence—Mother not father's wife—Evidence of father's will—Admissibility.

A testator and his wife were married in 1847. M. H. was born in 1850, and in the birth certificate the parents were given as the testator and his wife. Upon the death of M. H., the legacy duty for which the present trustee of a resettlement of the funds subject to the trusts of the testator's will became chargeable would be 1 per cent. if M. H. were the legitimate daughter of the testator and 10 per cent. if she were a stranger in blood. The inland revenue contended that M. H. G was not legitimate and sought to prove this by the evidence of: (i) the testator's will in which he always referred to M. H. as his "daughter or reputed daughter," (ii) the acts and statements of the executors of the testator's will who had, on the death of the testator, paid legacy duty on the bequests to M. H. on the footing that she was a stranger in blood, and (iii) an affidavit sworn by a grandson of the testator as to the reputation in the family with regard to the legitimacy of M. H.:— H

HELD: (i) the statements in the testator's will were not excluded by the rule in *Russell v. Russell* (1), that rule being limited to evidence of non-intercourse between spouses.

(ii) upon a consideration of the evidence, the *prima facie* presumption of legitimacy arising from the birth certificate was displaced and the

illegitimacy of M. H. was established. Legacy duty was therefore payable at the rate of 10 per cent.

[EDITORIAL NOTE.] In this case the rule in *Russell v. Russell* (1) is again discussed. Here the question was the admission in evidence of statements in a will suggesting illegitimacy. These were held to be outside the rule and, therefore, admissible. The rule is said to be limited to exclude evidence of non-intercourse between spouses.

AS TO THE RULE IN *Russell v. Russell* (1), see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para. 772, and FOR CASES, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97. The other recent cases upon the rule are *Farnham v. Farnham orse. Daniels*, [1936] 3 All E.R. 776, and *Stafford v. Kidd*, [1936] 3 All E.R. 1023.]

Cases referred to :

- (1) *Russell v. Russell*, [1924] A.C. 687 ; Digest Supp.
- (2) *Berkeley Peerage Case* (1811), 4 Camp. 401 ; 3 Digest 368, 91.
- (3) *Sturla v. Freccia* (1880), 5 App. Cas. 623 ; 22 Digest 52, 288.
- (4) *Murray v. Milner* (1879), 12 Ch. D. 845 ; 3 Digest 367, 84.

ADJOURNED SUMMONS to determine the rate of legacy duty payable on the death of the tenant for life under a resettlement, dated Apr. 4, 1899, of certain trust funds settled by the will of Samuel Hamer, who died on Feb. 5, 1866. By his will, which was dated Dec. 30, 1865, the testator bequeathed a legacy of £10,000 and a share of residue in favour of Margaret Hamer during her life and after her death (in the events which happened) in favour of her child or children or remoter issue as she should appoint. Margaret Hamer had been born in 1850 and was registered by Samuel Hamer as the daughter of himself and his wife Margaret, to whom he had been married on May 20, 1847. She subsequently became by marriage Margaret Holt, and had two sons, Wilmot Holt, who died on Apr. 2, 1899, without having been married ; and Herbert Cecil Holt, in whose favour, by deed dated Apr. 27, 1899, she irrevocably appointed all the residue of the trust moneys by the testator's will directed to be held in trust for her. By a settlement dated Apr. 28, 1899, Margaret Holt and Herbert Cecil Holt settled the property and funds then subject to the trusts of the testator's will upon trust for Margaret Holt for life, subject to an annuity of £150 in favour of Herbert Cecil Holt, and from and after the death of Margaret Holt in case (in the events which happened) she should leave any widow or issue of Herbert Cecil Holt her surviving, in trust for Herbert Cecil Holt his executors administrators and assigns for his and their own absolute use and benefit. Herbert Cecil Holt died on July 9, 1931, leaving him surviving a widow and one child, and Margaret Holt died on Dec. 18, 1933. The legacy duty for which the Public Trustee as the present trustee of the settlement of Apr. 29, 1899, became accountable or chargeable or liable to pay on the death of Margaret Holt would be 1 per cent. if Margaret Holt were the legitimate daughter of Samuel Hamer, but would be 10 per cent. if she were a stranger in blood to Samuel

Hamer. On behalf of the commissioners of inland revenue it was contended that Margaret Holt was in fact not the legitimate daughter of Samuel Hamer, the suggestion being that, although Samuel Hamer was her father, her mother was not Samuel Hamer's wife, but a niece of Mrs. Hamer. In order to prove this contention the Attorney-General, on behalf of the commissioners of inland revenue, desired to have admitted as evidence the will of Samuel Hamer, in which he always referred to Margaret Holt as "my daughter or reputed daughter," the acts and statements of the executors of the will of Samuel Hamer, one of whom was his brother-in-law, and another of whom was his nephew, who had, on the death of the testator in 1866, paid legacy duty on the bequests to Margaret Holt on the footing that she was a stranger in blood, and an affidavit sworn by a grandson of Samuel Hamer as to the reputation in the family with regard to the legitimacy of Margaret Holt. On behalf of the Public Trustee it was sought to exclude the evidence emanating from Samuel Hamer on the ground that it was inadmissible, as tending to bastardise a child born to him, whose legitimacy was *prima facie* established by the marriage certificate of him and his wife and the birth certificate of Margaret Holt as the child of him and his wife.

J. H. Boraston for the Public Trustee, the present trustee of the settlement of Apr. 29, 1899.

J. H. Stamp for the Attorney-General.

Boraston : The evidence of the father, Samuel Hamer, is inadmissible. The presumption in the first instance is that the child is born of the man's wife, and the rule that a father cannot bastardise his child is a general rule and does not apply only to non-access cases.

BENNETT, J. : The proposition is that a father cannot bastardise the child of his wife born during wedlock. But that is not assumed if you start by proving that the child in question is not the child of the wife but of another woman.

Boraston : That has not been proved. The assumption with which I start is that the child is lawfully born to Samuel Hamer. That appears on the birth certificate.

Stamp : The will of Samuel Hamer is admissible in evidence. The principle laid down in *Russell v. Russell* (1) is limited to the exclusion of evidence bastardising a child who is admittedly a child of the wife. That case is put entirely on this, that it is against decency to inquire into the relations between husband and wife, but that proposition must be based on the assumption that there is a child who is the child of the wife. The issue here is not whether a child born to the wife is the child of the father, which is admitted, and to disprove which the will would not be admissible, but whether the child is the daughter of the wife at all, or of another woman. The birth certificate is *prima facie* evidence

of that, and the question is whether the other evidence in the case is sufficient to displace that *prima facie* evidence, and I say it is. In addition to the will of Samuel Hamer in which he always refers to Margaret Holt as his "daughter or reputed daughter," the executors of his will

A paid duty on the footing that Margaret Holt was a stranger in blood, and they, being under a duty to know the position of the legatees on whose legacies they were paying duty, must have based their statement in this connection at least on family recollection, one of the executors being a brother-in-law of the testator. Also their statements must

B have been accepted by Margaret Holt, who was 20 years old at the time the payments were made, and who is thus a witness against herself. Thirdly, there is direct evidence that Margaret Holt was not the legitimate daughter of Samuel Hamer in the affidavit sworn by the son of a son of the testator, who states his family recollection. And he has not been

C cross-examined on that affidavit.

BENNETT, J. : Has the aspect of the *Russell* case (1) for which you are contending been considered ?

Stamp : Not since *Russell v. Russell* (1). As to the admissibility of hearsay evidence in such a case as this, see the statement of the law

D by LORD MANSFIELD, C.J., in the *Berkeley Peerage Case* (2), at p. 414, and *Sturla v. Freccia* (3), at p. 641, in which LORD BLACKBURN made a general statement as to the law of evidence on this point. See also *Murray v. Milner* (4), which is strictly *in pari materia*.

E *Boraston*, in reply : As regards the will, the argument in favour of its admission is based upon a fallacy when it is said that the child must be a child of the marriage for the *Russell* case (1) to apply. The position, before any of the Attorney-General's evidence is considered, is that this child is a child of the marriage. That being so, it is not permissible to

F bring in evidence of the father to show that she is the child of another woman, although that might be proved *aliunde*.

BENNETT, J. : But there is the clearest evidence which, if admitted, would tend to prove that the child was not the child of the marriage. Suppose Samuel Hamer had given oral evidence that his wife had not

G given birth to a child on the day on which Margaret Holt was born, on what principle would that evidence have been inadmissible ? It is not indecent to say that. Is your proposition that no evidence of a father or mother to bastardise a child is admissible ?

Boraston : That is the result of the decision in *Russell v. Russell* (1).

H Although that was a non-access case, the principle laid down by the EARL OF BIRKENHEAD, at p. 698, is much wider. There is also a passage by the EARL OF BIRKENHEAD, at p. 699, on the reasons given by LORD MANSFIELD for the rule. The rule there is put upon the ground of public policy that it is to the interest of father and child that the

simple rule stated by LORD MANSFIELD should apply, and that a parent should not bastardise his own issue.

BENNETT, J. : But the EARL OF BIRKENHEAD clearly had in mind that the child was the child of the mother. The court in *Russell v. Russell* (1) never considered a case where the whole question was whether the A child was the child of the mother.

Boraston : But here the certificate states that the child, who is born after the marriage of Samuel Hamer and his wife, is the child of that father and mother. It is begging the question to suggest that because the child is the child of another woman this evidence can be got in. B The admissibility of the evidence cannot depend upon the kind of challenge which is launched against the child.

BENNETT, J. : The question which has to be decided in this case is whether a Mrs. Margaret Holt was the legitimate daughter of the C testator, Samuel Hamer, for upon that question depends whether the legacy duty upon the legacy and share of the residue given to Margaret Holt by the testator is chargeable at the rate of 10 per cent. If Margaret Holt was not the legitimate daughter, 10 per cent. is chargeable. If she was, the rate of duty upon the legacy and the share of residue is 1 per D cent.

Margaret Holt was born in the year 1850. Before she was born there were married the testator, Mr. Samuel Hamer, and Miss Kenyon. That marriage was on May 20, 1847, and is proved by their marriage certificate which has been exhibited to an affidavit by Mr. Hockin, the plaintiff's E solicitor. The next document exhibited is a birth certificate, and there is no question that that is the birth certificate of the lady in question, Margaret Holt. The birth certificate shows that this child, Margaret, was born on Aug. 10, 1850. The name of her father is given as Samuel Hamer, the name of her mother is given as Margaret Hamer, formerly F Kenyon, the signature, description and residence of the informant is Samuel Hamer, the father, and upon that material it is contended, on behalf of the plaintiff, that the legal presumption is that Margaret Holt was the legitimate daughter of Samuel Hamer. The Attorney-General, on behalf of the commissioners of inland revenue, challenges that fact, G and adduces evidence which, it is said, displaces the presumption of legitimacy which is to be drawn from the two certificates in question. The evidence upon which the Attorney-General relies is first of all declarations by the father in his will ; secondly, declarations and acts by the executors of the father's will ; and, lastly, the oath of a grandson H of the testator of the reputation in connection with the legitimacy of Margaret Holt in the testator's family ; and upon that material the Attorney-General says that he has displaced the legal presumption which is to be drawn from the two certificates in question.

First of all, with regard to the will, the declarations of the father, the admissibility of that document in evidence was objected to by Mr. Boraston, on behalf of the plaintiff, upon the ground that to admit it would be to admit statements of a parent to bastardise a child born in wedlock, and his proposition was founded upon the case of *Russell v. Russell* (1), that statements made by a parent to bastardise a child born in wedlock are inadmissible in evidence. In my judgment the decision in *Russell v. Russell* (1) is not an authority for that proposition, but is far more limited and narrow. All that is excluded is evidence by a husband or a wife of non-intercourse after marriage with a view to bastardising a child. The case here made by the Attorney-General is that this child was never the child of the wife—that the child was a suppositious child—and the evidence is directed for that purpose to establishing that the wife of Mr. Samuel Hamer did not have a child at the time the child in question was born. I admit the evidence on the ground that it is not excluded by the rule established by the case of *Russell v. Russell* (1), that rule being limited, in my judgment, to evidence of non-intercourse between the spouses. The document is admissible, moreover, although it is hearsay, upon the ground that, in questions involving pedigree, hearsay evidence of reputation is admissible, the hearsay being that of members of the family.

In the will of the testator, which I have admitted as evidence, wherever he deals with bequests or provisions he makes for Margaret Holt he refers to her as his “daughter or reputed daughter,” and there are eight passages in the will in which he so refers to her, and that in a will in which he refers to a son as a son alone without any qualification. That is one piece of evidence upon which the Attorney-General relies. If it stood alone I am quite satisfied that it would not be sufficient to displace the presumption which arises from the two certificates in question. But it does not stand alone. When the executors of the testator’s will were delivering the account, which it was their duty to deliver for the purpose of satisfying the requirements of the inland revenue, a statement was made as regards Margaret Holt. The executors of the will were Mr. Carruthers, a brother-in-law of the testator, he being a brother of the testator’s second wife; Mr. Robert Rumney, a friend of the testator; and a Mr. Milton Hamer, a nephew; and in the account which was delivered the lady in question was referred to as a stranger in blood. The document in which she is so referred to is the receipt for the legacy duty, and she is referred to in the same way in the account which was delivered and which was signed on behalf of the executors by Mr. J. H. Carruthers, the testator’s brother-in-law, the brother of his wife, and upon the footing that Margaret Hamer, who afterwards became Margaret Holt, was a stranger in blood, legacy duty at the rate of 10 per cent. was paid.

The last piece of evidence is the affidavit of the grandson, who says that he has on many occasions heard his father speak of his family and relations, and on many occasions heard of similar matters from his great-aunt, Miss Annie Carruthers, the half-sister of his grandmother, and who then refers to conversations which he had heard, which, if the gentleman A is speaking the truth, and the people who were talking to him were also speaking the truth, leave no room for doubt at all upon the question as to whether Margaret Hamer was or was not legitimate. The statements, if true, make it plain that she was not.

Putting all these facts together—the statements used by the testator B in his will, the statements made by his executors when they were proving his will, the acts done by the executors in paying the duty upon the legacy and share of residue upon a footing that Margaret Hamer was a stranger in blood, and the talk which Mr. Cyril Sam Hamer says he had had with members of his family—the cumulative effect of all those facts C together, in my judgment, is to displace the *prima facie* presumption arising from the marriage certificate of Samuel Hamer and his wife and the birth certificate of the lady in question, and to establish beyond D reasonable doubt that Margaret Holt was illegitimate. The order will be that in the events which have happened the plaintiff as such trustee as aforesaid is accountable for or chargeable with or is liable to pay legacy duty at the rate of 10 per cent. Costs as between solicitor and client to come out of the residue of the trust property.

Solicitors : *Vizard, Oldham, Crowder & Cash* (for the plaintiff) ; *Solicitor of Inland Revenue* (for the Attorney-General). E

[Reported by C. M. YOUNG, Barrister-at-Law.]

THOMAS v. LEWIS.

[CHANCERY DIVISION (Farwell, J.), December 14, 15, 1936.]

Nuisance—Neighbouring owners—Injury to property—Distinction where injured property held under grant from owner of property on which nuisance exists—Implied agreement.

The defendant was the tenant of certain property, part of which he worked as a quarry. The plaintiff was the owner of adjoining property which he occupied as a farm. The plaintiff had been the sub-tenant of the defendant's predecessor in title of part of the defendant's property, and when the defendant became tenant of this part he agreed verbally to grant to the plaintiff the grazing rights. The defendant had worked his quarry for a number of years before this agreement. In an action for damages for injury suffered by the plaintiff as a result of the working of the quarry:—

HELD: (i) it was an implied condition of the agreement whereby the defendant had granted the grazing rights to the plaintiff, that the defendant should continue to work the quarry, and in the absence of improper use of the quarry the plaintiff could not complain of injury to the land, the subject of the defendant's grant.

(ii) no such condition could be implied with regard to the plaintiff's own land, and he could sue for any damage to such land from a wrongful act by the defendant.

[EDITORIAL NOTE.] The position here is briefly summarised thus. A quarry is being worked on field A. The adjoining field B. is let by the quarry owner to a farmer for grazing purposes. The next field C. is in the possession of the farmer quite irrespective of any grant from the quarry owner. Both B. and C. are injured by working of the quarry. The farmer cannot complain of the damage in field B., because there is in law an implied contract when he took the grant from the quarry owner that the latter should be at liberty to continue to work the quarry in the manner in which he was then working it. The farmer can, however, complain of damage in field C., as there can be no implied contract in that case. The distinction between the two cases carries the law a step further than was laid down in *Vanderpant v. Mayfair Hotel Co., Ltd.* (1).

AS TO PRINCIPLES OF MUTUAL ENJOYMENT OF ADJOINING PROPERTIES, see HALSBURY, 1st Edn., Vol. 21, Nuisance, pp. 530, 531, para. 898, and FOR CASES, see DIGEST, Vol. 31, p. 138, Nos. 2730-2741.]

Cases referred to:

- (1) *Vanderpant v. Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138; Digest Supp.
- (2) *Lytelton Times Co., Ltd. v. Warners, Ltd.*, [1907] A.C. 476; 12 Digest 608, 5033.
- (3) *Jones v. Pritchard*, [1908] 1 Ch. 630; 36 Digest 195, 363.
- (4) *Pwllbach Colliery Co., Ltd. v. Woodman*, [1915] A.C. 634; 19 Digest 13, 27.

ACTION to recover damages for injury suffered by the plaintiff as the result of the working by the defendant of a quarry, which adjoined the plaintiff's farm. The facts are stated in the judgment.

P. Gordon Bamber for the plaintiff.

F. R. Evershed, K.C., and *R. Gwyn Rees* for the defendant.

Bamber: The defendant has worked his quarry too near the plaintiff's land, and very considerable damage has been done on the plaintiff's

land by reason of the blasting operations in the quarry, which caused large stones to be thrown on to the land of the plaintiff. When hay was being cut, the machine ran over stones which had fallen on the plaintiff's land and new knives became necessary. There was also damage to a building.

Evershed, K.C.: The plaintiff was the tenant of land from the defendant and he took the land for the purpose of grazing and used it as part of his farm. The plaintiff's own property was fairly adjacent to the quarry. It was contemplated in this case that the defendant should continue to use the quarry in the way he had been doing. Also, it was contemplated that the defendant should have this right, not only as regards the grazing rights acquired, but also so far as it affected the adjacent land. [Counsel referred to: *Vanderpant v. Mayfair Hotel Co., Ltd.* (1); *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (2); *Jones v. Pritchard* (3); *Pwllbach Colliery Co., Ltd. v. Woodman* (4).]

FARWELL, J.: I have to deal first in this case with a preliminary point of law, and I have thought it right to deal first with this without going into any other question at all, because if I decide the preliminary question in a certain way it may result in its being unnecessary to call any further evidence. It seems to me that it would be a wrong use of the time of the court if I were to hear the whole of the evidence before first deciding that preliminary point.

The plaintiff is the owner and occupier of a farm in the parish of Vaynor in the county of Brecon, and the defendant is the lessee of a quarry which adjoins the plaintiff's land. The business of the quarry is carried on by the defendant, and it has been carried on for many years. The land immediately adjoining the quarry shown on the plan handed to me, and coloured pink, is land which was, prior to 1931, leased to a Mr. Wilkes who sub-let it to the plaintiff so that he could put cattle upon it. In Sept., 1931, Wilkes ceased to be the tenant of the land in question, and thereupon the defendant became the tenant, and he made an arrangement with the plaintiff by which the plaintiff paid £30 per annum to the defendant and took the land for the purpose of grazing. There was no written agreement, and it was a tenancy from year to year, subject to the plaintiff's paying £30 per annum to the defendant. The plaintiff is complaining that, by the way in which the defendant works his quarry, the defendant is causing damage to him. He says that large stones are thrown on to the land, and that they do damage both to the land of which he is the owner and which he has occupied for many years, and to the land which he claims under this arrangement between himself and the defendant. The facts regarding that are a matter for evidence hereafter, and I am not now concerned with that subject. It is said on the part of the defendant that, when, in 1931, the arrangement was

entered into under which the plaintiff became grazing tenant of the land which he took from the defendant, the defendant was, and had been for some period, carrying on the business of quarrying on his land, and that it is not open now to the plaintiff to complain, so long as the quarrying
A is being done in the same method as it was when the plaintiff made the arrangement and so long as it is not being done in any improper way. The basis on which that argument is founded is to be found in the judgment of LUXMOORE, J., in *Vanderpant v. Mayfair Hotel Co., Ltd.* (1), where he says at pp. 162, 163 :

- B It is a principle of law that if a person takes a grant over the property of another and it is in the contemplation of both parties that the grantor's property is going to be used for a particular purpose, the grantee cannot complain of anything arising in the course of that contemplated user. This principle does not depend on the doctrine of estoppel or anything of that kind, but is in fact the result of an implied contract. The grantee asks the grantor to give him a right over his (the grantor's) land, and the grantor agrees to do so, but at the same time
C says: "I am going to use my land for a particular purpose," and on that the grant is made. The legal implication is that the grantor is entitled to use his land for the purpose contemplated when the grant was made, and there is an implied contract binding on the grantee unless there is evidence that the user is improper; and it is only in the case where the user is improper that the obligation is released, because it was never contemplated by either party that there should be an improper user.
- D Then the learned judge refers to two cases. It is said in the present case that when the defendant granted rights over his land, which is outlined in pink, to the plaintiff, it was in the contemplation of both parties that the defendant was going to use, as he had done in the past, that portion of the land which he retained for the business of a quarry,
E and that in these circumstances the plaintiff cannot now be heard to complain that he is injured by such use of that portion of the land, unless he can prove that the use is improper or in some method different from the method adopted at the time the agreement was made. As, at the time the plaintiff became the occupier of the quarry, he well knew
F the quarry was being carried on by the grantor, he must be taken to have acquired his rights subject to the rights of the grantor to use his quarry in the way it was being used at the time of the grant. The defendant says that, in addition to any such implied agreement, it must be implied also that the plaintiff, being also the occupier of the
G adjoining farm, agreed that so far as the adjoining farm was concerned, he would make no complaint of the work being carried on at the quarry. He says that that is the implication which the law must draw, having regard to the fact that the occupier knew perfectly well that the quarrying was being carried on, and that, having acquired these rights over the
H defendant's land, he can have them only on the terms that the defendant should be free to carry on the quarrying business without any complaint being made by the plaintiff. In my view, the proposition of law, as stated by LUXMOORE, J., in *Vanderpant v. Mayfair Hotel Co., Ltd.* (1), is—I say with all respect—a perfectly true statement of the law, and it

is only necessary perhaps to refer to one other case, namely, *Lyttelton Times Co., Ltd. v. Warners, Ltd.* (2), where the matter is put in the same way. In that case the respondents, as lessees, were suing the appellants for an injunction. The facts were that both parties had agreed to the re-building of the appellants' house on the terms that the respondents were to rent from the appellants the upper floors as additional bedrooms for the continuance of their lease. It was thought, and it seems in vain, that bedrooms on the upper floor could be used as hotel bedrooms without any serious annoyance from the printing-machines which were going to be used on the ground floor. I should have thought that that was a sanguine attitude to adopt, but they adopted it. It turned out that they were wrong. The noise and the vibration caused by the presses on the ground floor were felt above and caused annoyance and inconvenience to the persons who occupied the rooms of the respondents as owners of the hotel. The adjoining rooms were affected by the noise because certain windows were opened. In these circumstances, the matter having come before the Privy Council, it was held that, in the absence of evidence that the defendants had erected the building improperly or had worked the machines and plant improperly, the appeal must be dismissed. Both parties contemplated that the appellants should keep on printing, and that the respondents should have reasonably quiet bedrooms, but the latter intention could not be enforced if it would frustrate the former. The appellants, having made this arrangement and obtained this grant from the respondents, knowing that the respondents were going to do what they had done before, could not complain, because it must be a contemplated term of the agreement that the respondents should be at liberty to go on using the printing-presses. It was all part of one arrangement, and it was not open to the appellants to say, "You must stop your printing-presses because you are causing me an annoyance, and it is a nuisance." Applying that principle here—and it clearly does apply—I feel no difficulty in coming to the conclusion that, so far as the land within the pink line is concerned, the land over which the defendant granted rights to the plaintiff, the plaintiff must be taken to have accepted those rights, on the footing that the defendant must be entitled to continue to use his quarry as he had used it before, although he might cause a nuisance to the plaintiff. It was not open to the plaintiff to complain. It was an implied term of the agreement that he took the rights over the land subject to the rights of the defendant to continue the quarry as he had worked it before. So far, I feel no difficulty. It is no longer open to the plaintiff in this action to complain of any nuisance in respect of the land which is outlined in pink owing to the use of the defendant of this quarry, unless he can show either that the way in which the quarry was being worked was in itself improper, or in some way different from the method employed

at the time of the arrangement, and differing in such a way as to cause a nuisance.

- But when one considers the very much wider claim with reference to the farm which the plaintiff occupies, and in respect of which he has
- A obtained no grant from the defendant and in respect of which he gets nothing from the defendant, the position is more difficult. It is true that the farm which is owned by the plaintiff closely borders upon the land outlined pink and the quarry on that land, and no doubt the right which the plaintiff claims over the defendant's land is for the purpose of
- B carrying on more advantageously his business as a farmer on the adjoining land. But when I am asked to say that it was agreed that, because the plaintiff claimed these grazing rights, he must be taken to have agreed that the defendant should be entitled to go on using his quarry as he had done in the past, notwithstanding that he might do damage to the
- C land of the plaintiff which is no part of the land granted by the defendant, it is much more difficult. It is always difficult in a case where the court has to take into account the extent of an implied grant. All the circumstances must be taken into consideration. I am quite unable to bring myself to the view that the parties, or either of them, con-
- D templated that by this arrangement, under which the plaintiff got some rights over the defendant's land, the plaintiff agreed that he would not thereafter complain of anything which the defendant did in his quarrying operations at all, although such operations might result in damage not to the land obtained from the defendant but to the land adjoining
- E the defendant's land and which is the plaintiff's own property.

In my judgment, to imply such an agreement in this case would be impossible. It follows, therefore, that the plaintiff is precluded from complaining of any injury which he might suffer on the land which is outlined in pink, and so far as that part of the claim is concerned the

F action fails. He is not precluded from complaining of any damage he can prove or of any wrongful act of the defendant so far as the other land is concerned, which is his own land, and which he has not obtained by any grant from the defendant. The action must proceed limited in that way.

- G [The further question of the amount at which the damages should be assessed was agreed between the parties.]

Solicitors: *Ellis & Fairbairn* (for the plaintiff); *Bell, Brodrick & Gray*, agents for *Arthur J. Prosser*, Cardiff (for the defendant).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re MILLS' WILL TRUSTS, MARRIOTT *v.* MILLS.[CHANCERY DIVISION (Bennett, J.), **December 1, 1936.**]*Will—Construction—*“*All my home and personal belongings.*”

Testatrix by her will gave to her daughter, F. M., “all my home and personal belongings except the piano and that is for my grandson. . . . All insurances to go to my daughter F. M.” :— A

HELD: the words “all my home and personal belongings” were sufficient to pass the whole of the residuary estate of the testatrix.

[EDITORIAL NOTE.] It was generally conceded in this case that “personal belongings” could mean personal estate generally, including cash on deposit at a bank and money out on loan. The contention was that specific gifts of certain personal property, namely, a piano and insurance moneys, formed a context by which the meaning of the term “personal belongings” would be restricted. This suggestion was rejected in view of the obvious intention of the testatrix to dispose of all her property. The decision is founded on the decision of *EVE, J.*, in *Re Bradfield* (1). B

AS TO PERSONAL BELONGINGS, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 710, 711, para. 1332, and FOR CASES, see DIGEST, Vol. 44, p. 735, No. 5899 and pp. 742-746, Nos. 5990-6036.] C

Cases referred to :

- (1) *Re Bradfield, Bradfield v. Bradfield*, [1914] W.N. 423 ; 44 Digest 722, 5722.
- (2) *Dean v. Gibson* (1867), L.R. 3 Eq. 713 ; 44 Digest 594, 4181.
- (3) *Rawlings v. Jennings* (1806), 13 Ves. 39 ; 44 Digest 695, 5363. D

ADJOURNED SUMMONS to determine a question of construction arising in the will of Mrs. Mary Mills, who died on Nov. 22, 1935. By her will, which was dated Jan. 13, 1930, the testatrix appointed her daughter Mrs. Florence Marriott to be the sole executrix thereof, and left to her all her “home and personal belongings” with the exception of her piano. The will also provided that “all insurances” were to go to Mrs. Marriott, and the question to be decided was whether the words “all my home and personal belongings” were sufficient to pass all the residuary estate of the testatrix which consisted of cash in the house, money on deposit in the Nottingham Savings Bank and money out on loan. E

G. P. Slade, for the plaintiff, Mrs. Marriott.

H. O. Danckwerts, for next of kin of the testatrix.

Slade : The words “personal belongings” are sufficient to pass all the residue for the following reasons : The word “belongings” in its primary sense has the general meaning of property and not of chattels in the sense of movable chattels. If that is so, the meaning of the word cannot be limited by placing the word “personal” in front of it, because personal, in the sense of personal property would be wide enough to include this residue : see *Dean v. Gibson* (2). Moreover, the words used here are “home and personal belongings” and inasmuch as the furniture would pass under the word “home,” personal belongings F

GH

must mean something more than mere furniture, and there is nothing to which the gift can relate except furniture and residue. If the above is the primary meaning of "personal belongings," neither the fact that the piano is expressly excepted, nor the fact that there is a specific gift of the insurances provides a sufficient context to cut down the primary meaning of these words. In *Re Bradfield*, *Bradfield v. Bradfield* (1), it was held that a context which was at least as restrictive as the one in this will passed the residue. Nor is the definition of the word "belongings" as meaning property inconsistent with the definition in the Oxford dictionary, where "belongings" is said to mean in its second sense "possessions, goods, effects." There is no suggestion there that it is confined to property of a movable nature.

Danckwerts: I concede that the plaintiff must get the insurance money and the household furniture, but she does not get the cash in the house, or the money on deposit or out on loan. I concede also that the word "belongings" by itself would be sufficient to carry all the personal property just as the word "effects" may. But the word "home" in this will is used in an adjectival sense and qualifies both furniture and personal belongings, so that the latter words cannot include money in the bank or out on loan. That construction is strengthened in this case by the reference to the piano and insurance, although a reference to some particular thing might not cut down general words. See *Rawlings v. Jennings* (3), which is very like this case, except that instead of "effects" the word used in this will is "belongings." That case is more like the present one than *Re Bradfield* (1), because the words in *Re Bradfield* (1) were "all other belongings."

BENNETT, J. : This will raises a very short point which I feel might be decided either way. The will was made by a markswoman, Mrs. Mills, on Jan. 13, 1930, and she says :

I hereby revoke all wills by me made at any time heretofore. I appoint Florence Marriott to be my executor and direct that all my debts and funeral expenses shall be paid as soon as conveniently may be after my decease. I give and bequeath unto my daughter Florence Marriott all my home and personal belongings except the piano and that is for my grandson John William Shepherd. All insurances to go to my daughter Florence Marriott.

That is the whole of the will. The lady died on Nov. 22, 1935, and when she died she had £147 cash in the house ; £679 16s. 3d. money on deposit in the Nottingham Savings Bank ; household furniture of the value of about £25 ; £66 9s. 6d. payable under policies of insurance ; and money out on loan which the plaintiff, as executor of her will, estimates, after allowing for bad and doubtful debts, should produce about £50. The question between the parties is whether, upon the true construction of the will, the plaintiff is beneficially entitled to the whole of the residuary personal estate not specifically bequeathed, or only to the

personal chattels belonging to the testatrix, except the piano, and the benefit of the life insurance policies held by the testatrix at the time of her death, the argument on behalf of the defendants being that, except as regards the personal chattels, the piano and the insurance policies, the testatrix has died intestate.

Now the word "belongings" is wide enough to cover a testatrix's personal estate, and has been held by EVE, J., in *Re Bradfield* (1) to have the primary meaning of property. So, unless there is sufficient in this will to afford a context restricting the meaning of the term "belongings," it should be interpreted as meaning property. The question is whether there is a context. The word is said to be restricted in its meaning by the use in connection with it of two adjectives "home" and "personal," and also by the specific gift of the insurances. Although I agree that the question is a doubtful one, there being a leaning in a court of construction against intestacy, I propose to decide that, upon the construction of this will, the testatrix has disposed of all her residuary personal estate, with the exception of the piano which she has specifically bequeathed to her grandson, founding myself on the judgment of EVE, J., in *Re Bradfield* (1), as to the question of the meaning of the word "belongings." There will be a declaration in the terms of 1 (a) of the summons. Costs of all parties as between solicitor and client out of the estate.

Solicitors: *Ridsdale & Son* (for the plaintiff); *Church, Adams, Tatham & Co.* (for the defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

**Re THE APPLICATION OF THE
SOCIÉTÉ DES USINES CHIMIQUES RHÔNE-POULENC**

[CHANCERY DIVISION (Crossman, J.), **November 24, 25, 26, 27,
December 1, 2, 3, 4, 1936.**]

Trade Mark—"Livron"—*Geographical name*—*Invented word*—*Trade Marks Acts, 1905-1919, ss. 9, 11, 35—Trade Marks Act, 1919 (c. 15), s. 9.*

The appellants were the owners of the trade mark "Livron." At the date of registration, Livron was a town of 4,000 inhabitants in France. The respondents, who conducted a similar type of business to that of the appellants, had one of their factories at Livron. The respondents applied for rectification of the register by removing this mark upon the grounds: (i) that the word "Livron" was a geographical name, (ii) that it was not an invented word, (iii) that its use was calculated to deceive, and (iv) that its use would prejudice their trade:—

HELD: the mark should be removed from the register upon the grounds that (i) the word was not an invented word, (ii) the word was a geographical name, (iii) the mark was not adapted to distinguish the goods of the appellants.

[EDITORIAL NOTE.] Though the evidence in this case is said to be unsatisfactory it would seem that the word "Livron" was, so far as the appellants were concerned, an invented word, and it seems beyond dispute that most educated persons in England would attach no geographical significance to the word. It would seem, however, taking this decision with that in the *Eboline* case (4), which it closely follows, that if a word can be shown at the time of registration to have had in fact a geographical significance, then it cannot be an invented word and is not registrable.

AS TO GEOGRAPHICAL NAMES AS TRADE MARKS, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, p. 691, para. 1257, and FOR CASES, see DIGEST. Vol. 43, pp. 146, 147, Nos. 72-78.]

Cases referred to:

- (1) *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade Marks*, [1898] A.C. 571; 15 R.P.C. 476; 43 Digest 140, 32.
- (2) *Re Fanfold, Ltd.'s Application* (1928), 45 R.P.C. 325; 43 Digest 183, 338.
- (3) *Re J. & P. Coats, Ltd.'s Application*, [1936] 2 All E.R. 975; 53 R.P.C. 355; Digest Supp.
- (4) *Re Salt (Sir Titus), Sons & Co.'s Application*, [1894] 3 Ch. 166; 11 R.P.C. 517; 43 Digest 146, 74.
- (5) *Philippart v. William Whiteley, Ltd., Re Philippart's Trade Mark "Diabolo,"* [1908] 2 Ch. 274; 25 R.P.C. 565; 43 Digest 141, 36.
- (6) *Re Magnolia Metal Co.'s Trade Marks*, [1897] 2 Ch. 371; 14 R.P.C. 621; 43 Digest 213, 583.
- (7) *Re Alexander Pirie & Sons, Ltd., Trade Mark* (1933), 50 R.P.C. 147; Digest Supp.
- (8) *Banham (George) & Co. v. Reddaway (F.) & Co.*, [1927] A.C. 406; 44 R.P.C. 27; 43 Digest 183, 337.
- (9) *Re Italia Fabbrica di Automobili's Application* (1910), 27 R.P.C. 493; 43 Digest 186, 349.
- (10) *Re Berna Commercial Motors, Ltd.'s Application* (1915), 32 R.P.C. 113.
- (11) *Impey Electrical, Ltd. v. Weinbaum, Re Impey Electrical, Ltd.'s Trade Marks* (1927), 44 R.P.C. 405; 43 Digest 220, 655.

- (12) *Re Chesebrough's Trade Mark "Vaseline,"* [1902] 2 Ch. 1 ; 43 Digest 178, 316.
- (13) *Wellcome (Trading as Burroughs, Wellcome & Co.) v. Thompson & Capper, Re Burroughs, Wellcome & Co.'s Trade Marks,* [1904] 1 Ch. 736 ; 43 Digest 206, 525.
- (14) *Re Standard Woven Fabric Co.'s Application* (1918), 35 R.P.C. 53 ; 43 Digest 139, 27. A
- (15) *Paine & Co. v. Daniells & Sons' Breweries, Re Paine & Co.'s Trade Marks,* [1893] 2 Ch. 567 ; 10 R.P.C. 217 ; 43 Digest 194, 422.
- (16) *Re Linotype Co.'s Trade Mark,* [1900] 2 Ch. 238 ; 17 R.P.C. 380 ; 43 Digest 138, 16.
- (17) *Re Burford (H. G.) & Co.'s Application,* [1919] 2 Ch. 28 ; 36 R.P.C. 139 ; 43 Digest 149, 92. B
- (18) *Re Liverpool Electric Cable Co. Ltd.'s Application* (1928), 46 R.P.C. 99 ; Digest Supp.
- (19) *Re "Apollinaris" Trade Mark,* [1907] 2 Ch. 178 ; 24 R.P.C. 436 ; 43 Digest 154, 127.
- (20) *Re Warschauer's Application* (1925), 43 R.P.C. 46 ; 43 Digest 150, 97.
- (21) *Re United Chemists' Trade Mark Assocn., Ltd.* (1923), 40 R.P.C. 219 ; 43 Digest 206, 526. C
- (22) *Re William Bailey (Birmingham), Ltd., Application to Register a Trade Mark, Re Gilbert & Co. Opposition* (1935), 52 R.P.C. 136 ; Digest Supp.
- (23) *Trade Marks Registrar v. Du Cros (W. & G.), Ltd.,* [1913] A.C. 624 ; 30 R.P.C. 660 ; 43 Digest 155, 138.
- (24) *Re National Galvanizers, Ltd.'s Application* (1920), 37 R.P.C. 202 ; 43 Digest 154, 126. D
- (25) *Re Garrett's Application,* [1916] 1 Ch. 436 ; 33 R.P.C. 117 ; 43 Digest 183, 336.
- (26) *Re Batt's Trade Mark* (1889), 6 R.P.C. 493 ; 43 Digest 146, 73.
- (27) *Re Clark, Son & Morland, Ltd.'s Trade Mark,* [1936] 2 All E.R. 1125 ; 53 R.P.C. 413 ; Digest Supp.
- (28) *Re Cassella (Leopold) & Co.,* [1910] 2 Ch. 240 ; 27 R.P.C. 453 ; 43 Digest 143, 54. E
- (29) *Re Crosfield (J.) & Sons, Ltd.,* [1910] 1 Ch. 130 ; 26 R.P.C. 837 ; 43 Digest 153, 114.
- (30) *Re Lea (R. J.), Ltd.'s Application,* [1913] 1 Ch. 446 ; 30 R.P.C. 216 ; 43 Digest 150, 99.
- (31) *In the Matter of a Trade Mark "Pup"* (1933), 50 R.P.C. 198. F
- (32) *Re Notox, Ltd., Application By, for a Trade Mark, Re Inecto Incorporated* (1930), 48 R.P.C. 168 ; Digest Supp.
- (33) *Boord & Son, Incorporated v. Bagots, Hutton & Co., Ltd.,* [1916] 2 A.C. 382 ; 33 R.P.C. 357 ; 43 Digest 163, 199.

APPEAL from a decision of the Assistant Comptroller, acting on behalf of the Registrar of Trade Marks. G

On Mar. 29, 1932, the appellants registered the word "Livron" as a trade mark in class 3 in respect of tonic medicines for human use. On Mar. 5, 1934, the respondents applied to the registrar to rectify the register by expunging the mark upon the following grounds : (i) that the word was a geographical name ; (ii) that it was not an invented word ; (iii) that its use would be calculated to deceive ; and (iv) that its use would prejudice the trade of the respondents in that they had a factory at Livron in France, where they manufactured drugs. The H

Assistant Comptroller found (i) that the mark was a geographical name ; (ii) that it was not an invented word, and (iii) that its use was calculated to deceive. He ordered the register to be rectified. The appellants appealed.

A *Kenneth R. Swan, K.C.*, for the appellants.

R. E. Burrell for the respondents.

Swan, K.C. : An invented word is one which conveys no signification, e.g., geographical, to an ordinary educated Englishman ; mere occurrence in a dictionary or gazetteer is not enough to destroy its inventive character.

B On the other hand, words like *Itala* (9), *Berna* (10) and *Sheen* (3), though geographical or descriptive, have been registered on evidence of distinctiveness. But small foreign places are unknown to most Englishmen, and many of them are perfectly good trade marks. The test is, does the word convey any meaning to educated Englishmen ? *Philippart v.*

C *William Whiteley, Ltd.* (5). There is no evidence here to show that this word had any meaning. The goods to which the word is applied must be considered : " Bath," when applied to buns, and " Swiss," when applied to rolls, have no geographical signification. If a mark is wrongly registered, it wrongly remains on the register ; but if it is rightly

D registered, it only wrongly remains on the register if the proprietor commits or omits something. Rectification should only be granted where a mark was wrongly registered originally, or where by some act or omission of the proprietor, it has become deceptive. In *Impex Electrical, Ltd. v. Weinbaum* (11) it was held that user of the name on the continent was

E immaterial as regards likelihood of deception in this country. The question here is : was the original registration proper ? The onus is on the applicant for rectification : *Cheseborough Manufacturing Co.'s Trade Mark* (12). In *Burroughs, Wellcome & Co.'s Trade Marks* (13) it was held that " tabloid," which was a newly invented word, was a fancy word

F to the average Englishman at the date of registration. In *Salt's Application* (4), " Eboline " was refused as being a geographical name, but the words " according to its ordinary signification " were not in the Act until 1907, and it is submitted that its refusal would not now be good law. *Eastman Photographic Co.'s Application* (1), shows that mere presence

G in a gazetteer or dictionary does not prevent a word from being an invented word. In *Magnolia Metal Co.'s Trade Marks* (6) the court refused to expunge a mark, because it did not appear to be geographical to an ordinary Englishman. [He referred to *Standard Woven Fabric Co.'s Application* (14) ; *Paine & Co. v. Daniells & Sons' Breweries* (15), and

H *Berna Commercial Motors Ltd.'s Application* (10).] A mere possibility of embarrassment to the French company might be a sufficient reason for the registrar to exercise his discretion against the original registration, but the only ground of this kind for removal of a mark is under sect. 11, that it is calculated to deceive. [He referred to *Linotype Co.'s Trade*

Mark (16).] It is important to see whether the use of a name is common in the particular trade in question : *Re Burford & Co.'s Application* (17). [He referred to *Liverpool Electric Cable Co.'s Application* (18), *Re "Apollinaris" Trade Mark* (19) ; *Re Warschauer's Application* (20), and *Re United Chemists' Trade Mark Assocn., Ltd.* (21).] The mere possibility of confusion arising is not enough ; there must be a real danger : *Bailey's Application* (22). In the case of an application to register a trade mark, the registrar may exercise his discretion against the applicant ; but in the case of an application to rectify the register, this discretion does not arise, and it must be proved in evidence that the registration is contrary to statute.

Burrell : The applicants here have only to satisfy the court that certain facts existed at the time of the registration which would make the mark "an entry without sufficient cause" within sect. 35. The registrar can say either that the mark was improperly registered, or that he would not have registered it in the exercise of his discretion had the true facts been known to him. The registrar found that the evidence of distinctiveness was wholly insufficient, especially in view of the fact that the applicants have a factory at Livron. If the mark is registered in this country, it could be registered in France under the International Convention, and embarrassment would certainly be caused. The registrar is entitled to review the registration in the light of all the evidence that would have been relevant. The decision of the registrar should not be overruled except upon definite grounds : *Bailey's Application* (22). [He referred to *Trade Marks Registrar v. Du Cros (W. & G.), Ltd.* (23) ; *Re National Galvanizers, Ltd.'s Application* (24) ; and *Re Garrett's Application* (25).] In *Re Fanfold Ltd.'s Application* (2) it was held that a mark registered under any of subsects. (1)-(4) of sect. 9 must be distinctive. It is immaterial that the owners of the mark do not know that the mark is geographical : *Re Batt's Trade Mark* (26). The *Solio* case (1) did not deprive an Englishman of any word, but this mark deprives him of the use of a place name. In *Clark, Son and Morland, Ltd.'s Trade Mark* (27), the word "Glastonburys" was held to be not adapted to distinguish, because the applicants for rectification had carried on a business at Glastonbury for a long time. In *J. & P. Coats Ltd.'s Application* (3) it was held that the question of adaptability to distinguish is a practical matter for the registrar to decide, rather than the court ; the registrar here has decided that the mark is not adapted to distinguish, and his decision should be respected. An existing geographical word is not an invented word : *Re Salt's Application* (4). There is no reported case in which a geographical word has been registered under sect. 9 (3) or sect. 9 (4). An invented word must not only be newly coined but it must not convey any obvious meaning : *Philippart v. William Whiteley, Ltd.* (5). [He referred to *Re Linotype Co.'s Trade Mark* (16) ; *Re Warschauer's Applica-*

tion (20) and *Re Cassella's Application* (28).] If the registrar had known of this word, registration would have been refused. To be registrable, a geographical word must have an ordinary meaning as well : *Magnolia Metal Co.'s Trade Marks* (6). That prevents it from being deceptive.

- A [He referred to *Re Crosfield (J.) & Sons, Ltd.* (29); *Berna Commercial Motors Ltd.'s Application* (10); and *Re Itala Fabbrica di Automobili's Application* (9).] The presence of other traders in the place is a serious consideration even when user is proved : *Liverpool Electric Cable Co.'s Application* (18). People acting in good faith ought not to be subjected
- B to the risk of legal proceedings : *Re Lea Ltd.'s Application* (30); in this case the respondents and all their agents would be subject to this risk. [He referred to *In the Matter of a Trade Mark "Pup"* (31).]

Swan, K.C., in reply : The question of foreign markets is quite irrelevant under the Act ; only the British market need be considered.

- C In applications for rectification, the question is one of adjudication—whether the mark satisfies the statute—and not of discretion ; all the cases on discretion are cases of applications to register marks. The onus is on the respondents to show that at the date of registration there was such a trade interest as to cause substantial difficulty or confusion :
- D *Re J. & P. Coats, Ltd.'s Application* (3). The only evidence is that Livron did appear in the gazetteers. The existence of the factory is immaterial unless there was knowledge of it in this country. Although circulars may have been sent to this country, that is no proof of actual knowledge here : *Re Notox, Ltd., Application by* (32). [He also referred to *Boord & Son, Incorporated v. Bagots, Hutton & Co., Ltd.* (33).] In *Paine & Co. v. Daniells & Sons' Breweries* (15), rectification was refused in a case where the mark might successfully have been opposed at the time of registration. In the present case the court has to review the action of the registrar in 1932, and to decide whether in view of the facts now
- F proved, he ought not to have registered the mark. The respondents have failed to show that the word was not genuinely originated by the appellants ; it is therefore an invented word : *Eastman Photographic Co.'s Application* (1).

- G CROSSMAN, J. : This is, to my mind, a very difficult case and a very interesting one. It has been outstandingly argued on either side and I am very much indebted to counsel for their arguments. It is an appeal by Boots Pure Drug Company, Ltd., whom I shall refer to as Messrs. Boots & Co., from a decision of the assistant comptroller of trade marks
- H acting for the registrar directing that the register of trade marks be rectified by the removal therefrom of the trade mark No. 530535 registered in class 3 in respect of tonic medicines for human use. The trade mark was registered as of the date Mar. 29, 1932, and it consists of the word " Livron " standing alone. On Mar. 5, 1934, the Société des

Usines Chimiques Rhône-Poulenc, to whom I shall refer as the French company, applied to the registrar to rectify the register by expunging the trade mark in question. On June 8, 1934, Rodolphe Pfister, a director of the French company, made a declaration in support of the application, and, as a good deal of the argument has turned on the exact extent and value of the evidence in this case, I propose to read what M. Rodolphe Pfister says in support of the application in his declaration. He says he is a director of the French company in Paris, and he has been connected with that company and their predecessors in business since the year 1896. Then he says :

2. Messrs. Boots Pure Drug Co., Ltd., registered the word "Livron" in respect of "Tonic medicines for human use" in class 3 on Mar. 29, 1932. It was only in the year 1933 that the mark was brought to our notice, and we at once communicated with our trade mark agents with a view of objecting to the registration. As a certain amount of correspondence took place between ourselves and our agents and Messrs. Boots, and as Messrs. Boots refused to cancel their registration, the present application to rectify the register was filed.

3. At the date of the application for registration, namely, Mar. 29, 1932, the word "Livron" was the name of a small town situated in the department of the Drome, and at that date the population of the town was about 4,000 persons. I am informed that the name "Livron" is to be found in the following Gazetteers in the British Patent Office library : LIPPINCOTT'S NEW GAZETTEER, 1912 ; LONGMAN'S GAZETTEER OF THE WORLD, 1895.

That, strictly speaking, is not evidence, but I understand it is not disputed in fact that the name was found, I think, in four gazetteers. Para. 4 is of no value.

5. My Société are specialists in the manufacture of drugs. One of their main factories is situated at Livron, in the department of the Drome, and the registration by Boots Pure Drug Co., Ltd., of the word "Livron" as a trade mark for a medicinal preparation is particularly objectionable to the Société des Usines Chimiques Rhone-Poulenc from the fact that they have one of their principal factories at that town.

6. The fact that we have a factory at Livron is stated on our catalogues, which are circulated in the United Kingdom and Northern Ireland. Specimens of these catalogues are now produced and shown to me and marked "R.P. No. 1."

The first of these catalogues is dated Oct., 1931, but it has fastened in it a leaflet dated Oct., 1933. Whether that means to say that the particular catalogue was not circulated until 1933 I cannot say, but it suggests that. The second catalogue is dated Apr., 1934, and the third is dated Jan., 1933. That is the evidence in chief in support of the application to expunge the trade mark from the register.

There were three declarations made in opposition to the application. The first and most important, I think, is the declaration of Walter Williams, who says he is the assistant secretary of Messrs. Boots & Co., and he has read the declaration of Rodolphe Pfister. In para. 3 he says :

In reference to para. 4 of the said declaration I say that in the United Kingdom the word "Livron" was not at the date of my company's registration thereof nor is it at the present date in its ordinary significance a geographical name.

That is simply a statement of one of the points I have to determine, and

therefore I cannot accept it in any way as evidence. The next passage is of importance :

The word was originated by my company as a newly invented word, that is to say, a word which had no ordinary significance in this country, but which would strike the British public as a novel and newly coined word.

Those phrases suggest rather a remarkable resemblance to some of the words used in the decided cases, it rather suggests the origin of the expression.

If by para. 4 of his declaration Mr. Pfister means no more than that the word "Livron" can be found in the gazetteers to which he refers, I admit that fact ; but apart from this fact I deny that Mr. Pfister has any ground or qualification, seeing that he is resident in France, for making the statement contained in the said para. 4. My company has used the word "Livron" as a trade mark since Aug., 1932, to denote and distinguish a particular tonic of their manufacture—and the word "Livron" has been widely advertised as its trade mark for the said tonic and has come, as the result of such advertisement and use, to denote and distinguish exclusively the said tonic of my company's manufacture.

5. The use of the said mark "Livron" by my company has not in any way interfered with nor is it likely to interfere with the legitimate use by the applicants or anyone else at their address of any desired reference to the locality of their works, or to cause confusion between their goods and the goods of my company.

6. A typical specimen of the goods sold by my company under its trade mark "Livron" with accompanying leaflet is now produced and shown to me and marked "W.W.1."

That exhibit, "W.W.1," contains the word "Livron" at the top of the carton in which the bottle is contained, but it contains the words "a Boots product" at the top, and if that is the only use which is made of the trade mark, it is difficult to see how there could be any substantial complaint of injury by any other person or a person who manufactured at Livron. On the face of it it is a product of Boots & Co., but, of course, the word "Livron" could be used in many other ways and for other drugs than this particular drug and without this particular carton or any reference to Messrs. Boots & Co. Then there are three declarations by persons with experience in the drug trade. There is a declaration of Mr. Harold E. Brown, who says :

I have followed my profession of pharmacist for the past 40 years. For the past three years I have been familiar with the trade mark "Livron" which has always been used in connection with a tonic marketed by Messrs. Boots Pure Drug Co., Ltd., and I have associated the word only with such goods.

The rest of the affidavit I do not think really is of any value ; he expresses his opinion and a certain amount of hearsay evidence. Then there is an exactly similar affidavit by Mr. William Joseph Wiltshire, of Harrow, Middlesex, who has been departmental manager to a wholesale druggist for 30 years, and he makes the same statements ; and the same statements are made by a Mr. Wildish Moreton Woodhouse, of Bull Ring, Ludlow, who has followed his profession of chemist and druggist for the past 32 years. Then Mr. Rodolphe Pfister makes a declaration in reply in which he says he has read Mr. Williams' declaration and in para. 3 he says :

The deponent, Walter Williams, states : "The word (Livron) was originated by

my company as a newly invented word." The deponent does not indicate the exact date when the word was invented, but as he states it was a newly invented word, I should not be wrong in supposing that it was invented within the past 10 years. Being of Swiss nationality I can regard geographical names in France from the same standpoint as the deponent. My representatives will refer at the hearing to the *IMPERIAL GAZETTEERS*, edited by W. G. Blackie, Ph.D., published by Blackie & Son in the year 1855, which is to be found in the Patent Office library, and another edition of the same book published in the year 1873, under the heading *Livron*. I submit that the word "*Livron*" was not an invented word within the meaning of the Trade Marks Act. A

Then he says he is unable to deny para. 4.

With reference to para. 5, the names of medicines are international in character, and the greatest care has to be taken in their selection and protection. The word "*Livron*" denotes the factory of one of our manufacturing subsidiaries, and is a matter of serious objection on the part of the opponents. B

That is the evidence, and it seems to me to be rather thin on both sides. It would have been very much more satisfactory if I came to deal with this case on more complete evidence, but there it is, and I have to deal with it on that basis. On May 2 of this year, the assistant comptroller gave his decision in writing directing the removal of the trade mark from the register. On May 2 of this year Messrs. Boots & Co. gave notice of motion to reverse the assistant comptroller's decision. The application by the French company to the registrar was made under the Trade Marks Act, 1905, s. 35, as amended by the Trade Marks Act, 1919, s. 9. Sect. 35 of the 1905 Act is as follows : C

Subject to the provisions of this Act—(1) the court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of any entry— D

and these are the material words—

or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, make such order for making, expunging, or varying such entry, as it may think fit : (2) the court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of the register. E

I do not think subsects. (3) and (4) really bear in any way upon this question. Then sect. 9 of the Act of 1919 says : F

(1) Any application for the rectification of the register or the removal of any trade mark from the register in respect of any goods which, under sect. 35 [the section I have just read] or sect. 37 of the principal Act or under Part II of this Act, is to be made to the court, may, at the option of the applicant, be made in the first instance to the registrar. G

In this case the applicants exercised their option and applied in the first instance to the registrar, and I have the advantage of his decision and the reasons which he gives for it in this case. The French company say that they are persons aggrieved by an entry made in the register without sufficient cause or by an entry wrongly remaining on the register within the meaning of sect. 35. The assistant comptroller in his decision says this : H

Now the essence of the applicants' case is that the registration of the Trade

Mark No. 530535 was made without sufficient cause and that the entry wrongly remains on the register, inasmuch as the registration was effected contrary to the provisions of sect. 9 (4) of the Act of 1905, which defines one form of a registrable trade mark as "a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname."

A I cannot quite understand that statement, because it seems to me that the applicants' case is much wider than that, and that is only a very partial statement of the French company's case, and the grounds on which they contended, and on which they now contend, that the entry of
B Messrs. Boots & Co.'s trade mark on the register was made without sufficient cause, or wrongly remains on the register, are really threefold. The first ground is that the trade mark, they say, had not any one of the essential particulars mentioned in the Trade Marks Act, 1905, s. 9; secondly, they say that, even if the trade mark had one of the essential
C particulars, there were circumstances which would have required the registrar in the exercise of his discretion under sect. 12 (2) of the Act to refuse to register the trade mark; and, thirdly, a separate ground, that the use of the trade mark was in the circumstances calculated to deceive within the meaning of sect. 11. I must look at those three
D sections, all of which are material, I think, to this case. Sect. 9 of the Act of 1905 is the section which lays down what is necessary to make a trade mark a registrable trade mark. It says:

A registrable trade mark must contain or consist of at least one of the following essential particulars—

E that is to say, it seems to me, that unless it contains or consists of at least one of these it cannot be registered at all; there is an absolute bar to registration. Subsect. (1) is:

The name of a company, individual, or firm represented in a special or particular manner.

F That is not a case within which this case can come. Then subsect. (2) is:

The signature of the applicant for registration or some predecessor in his business.

G Again this case cannot come within that. Subsect. (3) is the one within which Messrs. Boots & Co. say that the word comes in the first instance: "An invented word or invented words," and subsect. (4):

A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname.

H Subsect. (5) reads:

Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paras. (1), (2), (3) and (4), shall not be registrable under the provisions of this paragraph, except upon evidence of its distinctiveness.

Under that subsection I understand it is not suggested that the mark

was registered or could have been registered as having that essential particular. Those are the five subsections within one of which the case must be brought in order to be a registrable trade mark. So we are thrown back upon subsect. (3) and subsect. (4) to find out whether this trade mark contains or consists of one of those essential particulars. A The section goes on with a proviso which I do not think I need read for this purpose, but it says this :

For the purposes of this section "distinctive" [that is, the word "distinctive" in the words "any other distinctive mark"] shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. B

Then it goes on to say :

In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered. C

That again is not material to this case, because it is common ground that the trade mark was not in use at the time of the registration and there was not and could not have been any evidence that it had been in fact rendered distinctive by user at that date. Reading the assistant comptroller's decision with great care, and I have read it many times, D I come to the conclusion that he has decided in favour of the French company on each of the three grounds mentioned above. What I have to consider is whether the true facts, or the true facts as now proved, at the date of the registration were sufficient to justify registration. It is now settled by authority that in order to be registrable under sect. 9 E a trade mark need not contain or consist of more than one of the essential particulars mentioned in sect. 9. It appears at one time to have been thought or contended that those subsections were somewhat inter-related, but now it is quite clear, as I think was established in the *Solio* case (1), at p. 484. That is a passage which makes it quite clear that F if the trade mark contains or consists of one of those particulars, that by itself makes it registrable as a trade mark. But I think it is also settled by authority, and for that I should refer to the quite recent cases, the *Fanfold* case (2), at p. 325, in which the Court of Appeal's decision upheld the decision of TOMLIN, J., as he then was, and the more recent case still, G which was known as the *Sheen* case (3), in a passage on p. 366 in the judgment of LUXMOORE, J. It is established, I think, that every trade mark must be distinctive in the sense of adapted to distinguish the goods of the proprietor from those of other persons. Even if the trade mark in the present case can be said to be either an invented word or H a word having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or a surname, it ought not to have been registered if it was not in fact adapted to distinguish the goods of Messrs. Boots &

Co. The assistant comptroller, relying upon a case which is known as the *Eboline* case (4), has held that "Livron" was not an invented word and did not come within sect. 9 (3) of the Act of 1905, because it was a word already in existence, although Messrs. Boots & Co. believed that they had invented it. This view of the assistant comptroller is, in my judgment, supported by the case known as the *Eboline* case (4), which to this extent is not affected by the subsequent case known as the *Solio* case (1), and it is also, I think, supported by the *Diabolo* case (5). In the *Eboline* case (4), which is entitled *Re Sir Titus Salt, Sons & Co.'s Application*, CHITTY, J., as he then was, in his judgment said this at p. 518 :

This is a motion for an order directing the comptroller to proceed with an application to register as a new trade mark the word "Eboline" in class 31 for silk piece goods. The question depends on the 64th section of the Act as amended in 1888.

That is the 1883 Act which was amended in 1888 and contains, so far as we are concerned with this subsection, the same words "an invented word or invented words." Sect. 64 amended in 1888 says this :

For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars—

and (d) under that is "An invented word or invented words." CHITTY, J., was considering whether the word "Eboline" was an invented word. He said at p. 518 :

The question depends on the 64th section of the Act as amended in 1888, which requires that a trade mark must consist of or contain at least one of the enumerated essential particulars, amongst which are (subject. (d)) an invented word and (subject. (e)) a word having no reference to the character or quality of the goods, and not being a geographical name. The applicants' manager says that he invented the word "Eboline," and no doubt he is speaking honestly according to his belief. But it appears that Eboli is the name of an Italian town of 11,000 inhabitants mentioned in the *GAZETTEER*. The mere addition of the common English termination "ne" is not sufficient to make the word an invented word. A word already in existence cannot properly be said to be an invented word because the person claiming to have invented it was not aware of its existence.

I think it is agreed that that passage would be more accurate if the word "merely" occurred before the word "because," and I notice the assistant comptroller in his declaration has inserted the word "merely" there. He says it

cannot properly be said to be an invented word merely because the person claiming to have invented it was not aware of its existence.

CHITTY, J., says :

What the Act requires is that the word should be an invented word in fact, and not merely in the belief of the person claiming to register it as a trade mark. "Eboline," therefore, is not an invented word within subject. (d).

That was a case where the word was not the actual name of a town,

but a word formed from it, the town being Eboli, and the word "Eboline" ending with "ne." It was held there it was not an invented word, because of the existence of the Italian town, which presumably is an existing word, and you cannot invent something which is already in existence. If "Livron" is not an invented word within sect. 9 (3), it has not one, at all events, of the essential particulars mentioned in sect. 9, that is, the one in subsect. (3). I think it was not an invented word in fact, but only in the belief of Messrs. Boots & Co., and that, in my judgment, is not sufficient to make it an invented word.

The next matter which the assistant comptroller had to deal with was sect. 9 (4) of the Act—did it come within that subsection, did it contain or consist of the essential particulars therein mentioned? He has held that "Livron" is, according to its ordinary signification, a geographical name, and therefore he held that it did not come within subsect. (4). I have to consider whether he was justified in that. In my judgment, "Livron" is a word whose only signification is geographical, or at all events at the date of this application for registration its only significance was geographical. I think that, on the authority of the *dicta* in what is known as the *Magnolia* case (6), it is a word which is, according to its ordinary signification, a geographical name, and therefore does not contain the essential particulars mentioned in sect. 9 (4). At the time of the application to register, it had, in my view, no signification whatever except its signification as a place name, and it seems to me the case is quite different from the *Magnolia* case (6) on which counsel for Messrs. Boots & Co. has relied, and in which the judgment of KEKEWICH, J., has been read, where the word "Magnolia" was held not to be, according to its ordinary signification, a geographical name. Those words did not occur at that time in the Act, but KEKEWICH, J., as I understand it, really read the then existing Act boldly, as Mr. Swan says, as if it contained the words "according to its ordinary signification." He held, if you read it, that according to its ordinary signification, the word "Magnolia" was not a geographical name, but the point of that case was, and it seems to me to distinguish it entirely from the present case, that the word "Magnolia" was a word well known in the English language and it had a very definite meaning. It meant the well known tree, shrub or flower, and to any ordinary English person it would have that meaning only. When you say what is the ordinary signification of the word "Magnolia," you come to the conclusion quite definitely that the ordinary signification is what you may call a horticultural signification and not a geographical signification. I come to the conclusion that the assistant comptroller was right when he decided that this word in this case, "Livron," was not within sect. 9 (4), because, as the only signification of the word at the time was a geographical signification, one cannot say it was not according to its ordinary signification a geographical

name. It is not suggested that the name "Livron" contains or consists of the essential particulars contained in sect. 9 (1) or (2), and it cannot come within subsect. (5), because in fact no evidence of its distinctiveness was adduced or ever has been adduced.

- A In my judgment, therefore, the trade mark is not, and was not at the date of the application to register, registrable within the meaning of sect. 9. But the assistant comptroller has also held that, in the circumstances which are now known, but which were not known at the time of the registration, the word "Livron" was not adapted to distinguish
- B the goods of Messrs. Boots & Co., and therefore that for another reason it was not registrable. This finding was based on the view that the fact that Livron was the name of a town in France at which the French company manufactured fine chemicals, if known to the registrar, would have made it proper for him to refuse registration on the ground
- C that registration might embarrass the French company and anyone else who might manufacture fine chemicals at the town of Livron. This question, namely, the question whether the trade mark was adapted to distinguish the goods of the proprietor of the trade mark or not, is a practical question on which the registrar's decision is *prima facie* to be
- D regarded as right. I cannot help being affected by the observations of LORD WRIGHT, M.R., in the *Sheen* case (3) to which I have already referred, at p. 979. He says this :

It is perfectly clear, as was said by LORD TOMLIN in *Re Alexander Pirie & Sons, Ltd. Trade Mark* (7), that the court, while determining the weight to be attached to the registrar's view, must exercise its own mind upon the solution of the problem under consideration. LORD TOMLIN prefaced that by saying that the court should attach great weight to the registrar's conclusion upon any matter which falls pre-

- E eminently, as these matters do, within his experience. To the same effect, VISCOUNT DUNEDIN in *George Banham & Co. v. F. Reddaway & Co.* (8), at p. 413, says : " Now, it is true that an appeal lies from the decision of the registrar, but in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with." With great respect to the learned Lord, the word "clearly" may
- F perhaps be regarded as tautologous. If, in the view of the court, examining all the circumstances, the registrar has gone wrong, then that must mean he has gone clearly wrong. The only matter to observe is that *prima facie* the registrar's decision will be regarded as correct. VISCOUNT DUNEDIN added some observations which appear to me to be very important. He says : " The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case."
- G That observation appeals to me with peculiar force after examining all the numerous cases which have been cited on matters analogous to that which is in question here.

- In regard to this particular question with which I am dealing, which is, of course, not strictly necessary if I am right on the first two points, I find that the assistant comptroller has come to a definite conclusion on
- H this question of fact and, after very careful consideration, I can find no sufficient ground for differing from the assistant comptroller's view.

In the circumstances I am bound to hold that the entry of the trade mark in the register was made without sufficient cause within the meaning of sect. 35 of the Act of 1905, and that the assistant comptroller was

right in his decision. It follows from that that I must dismiss the motion.

Motion dismissed with costs.

Solicitors: *Seaton Taylor & Co.* (for the appellants); *G. B. & L. Ellis* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

MARSTRAND FISHING CO., LTD. v. BEER.

[KING'S BENCH DIVISION (Porter, J.), **December 9, 10, 11, 14, 21, 1936.**]

Insurance—Marine insurance—Barratry—Actual total loss—Constructive total loss—True facts at time of abandonment—Marine Insurance Act, 1906 (c. 41), ss. 57, 60 (1), (2) (i).

(i) The taking of a ship by barrators is not in itself sufficient evidence of irretrievable loss to constitute "actual total loss."

(ii) Constructive total loss of a ship is only established when, on the true facts at the time of abandonment, and not on the facts as they are known or appear at that time, it appears to a reasonable man that the balance of probabilities is against the recovery of the ship.

[EDITORIAL NOTE.] The facts are here taken as at the commencement of the action, using that term as referring to the time of the receipt of notice of abandonment, which it is the custom of underwriters to agree to be deemed to be the date of the writ. In the view taken of the facts it was not necessary to decide what date is the really material date. For a discussion on this point, see HALSBURY, Hailsham Edn., Vol. 18, p. 363, note (b). It was clear that the facts would not support a case of total loss within the statutory definition in Marine Insurance Act, 1906, s. 57. The real question thus becomes whether there was a constructive total loss within sect. 60 (2), i.e., whether upon the true facts at that time it was unlikely that the ship would be recovered.

AS TO TOTAL LOSS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 352-354, paras. 506-508, and pp. 364-366, paras. 522-524; and FOR CASES, see DIGEST, Vol. 29, pp. 253, 254, Nos. 2042-2056, and pp. 272-274, Nos. 2202-2220.]

Cases referred to:

- (1) *Dean v. Hornby* (1854), 3 E. & B. 180; 29 Digest 220, 1764.
- (2) *Stringer v. English & Scottish Marine Insurance Co.* (1870), L.R. 5 Q.B. 599; 29 Digest 255, 2067.
- (3) *Polurrian S.S. Co., Ltd. v. Young*, [1915] 1 K.B. 922; 29 Digest 273, 2213.
- (4) *Cohen (G.), Sons & Co. v. Standard Marine Insurance Co., Ltd.* (1925), 41 T.L.R. 232; 29 Digest 188, 1457.
- (5) *Houstman v. Thornton* (1816), Holt, N.P. 242; 29 Digest 204, 1636.
- (6) *Aitchison v. Lohre* (1879), 4 App. Cas. 755; 29 Digest 236, 1899.

ACTION by the owners of the "Girl Pat" against a Lloyd's underwriter for the total loss of the "Girl Pat," under a policy of marine insurance.

The plaintiffs alleged that the master and/or crew of the ship had piratically and feloniously stolen the "Girl Pat." The defendant denied that the "Girl Pat" had become either an actual total loss or a constructive

total loss, and he further denied that the plaintiffs had been irretrievably deprived of the vessel or that it was unlikely that they could recover it. The facts are set out in the judgment.

A The material provisions of the Marine Insurance Act, 1906, are as follows :

57. (1) Where the subject matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss, no notice of abandonment need be given.

B 60. (1) Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

C (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered.

K. S. Carpmael, K.C., and J. V. Naisby for the plaintiffs.

H. U. Willink, K.C., and Charles Stevenson for the defendant.

D *Carpmael, K.C.*: Capture is sufficient evidence of constructive total loss : *Dean v. Hornby* (1), *Stringer v. English & Scottish Marine Insurance Co.* (2). The test is a subjective one under the Marine Insurance Act, 1906, s. 60 (1); the word used is "appears." Even if an objective test be applied, the "Girl Pat" was at material times reasonably abandoned.

E *Willink, K.C.*: Capture and condemnation are required for actual total loss. Mere capture is not evidence even of constructive total loss. Time is unimportant : *Houstman v. Thornton* (5), *Aitchison v. Lohre* (6). The test is objective. Sect. 60 (1) must be interpreted in the light of sect. 60 (2) (i) (a). The word "appears" means "in the light of the true facts"—not the "apparent" facts : see *Polurrian S.S. Co., Ltd. v. Young* (3). Even if the test be subjective, the evidence here does not fulfil the subjective test.

G H *PORTER, J.*: This is an action on an insurance policy insuring, amongst other things, against perils of the seas, against theft, and against barratry. It is an action on a Lloyd's policy in the ordinary form containing insurance against ordinary perils. The insurance is in respect of the vessel known as the "Girl Pat." The plaintiffs in the action are the owners of that vessel, and the defendant is one of Lloyd's underwriters. The vessel is part of a fishing fleet owned by the plaintiffs, and is, at any rate, not one of their smaller vessels, and was insured for the sum of £3,600. She had been under certain repairs, and she sailed from Grimsby originally on the voyage in respect of which the claim was made on Mar. 31, 1936. Her master was one George Black Orsborne, and her crew, except the engineer, G. F. Jefferson, were chosen

by him. It appears that George Black Orsborne was a man of a somewhat hot temper, and it was thought advisable to let him choose his own crew rather than to provide him with a crew chosen by the owners. He originally had been given another ship, and the "Girl Pat" had been given to another master as from Apr. 8, 1936. It followed that the "Girl Pat" must be back in Grimsby by that date. The instructions given to the master were to fish in the North Sea, and it was suggested, but not given as a definite instruction, that he should join one of the other ships of the plaintiffs, the "Student Prince," which was fishing some 56 miles E. by N. of Spurn. It is said that the ship originally sailed on Mar. 31, but, according to the evidence given, even before that date the master had been discussing with the crew, or expected crew, the question of not taking the ship to the fishing grounds, but of running off with her. In fact, some trouble occurred to her engines and she put back, but that was got over, and she sailed again on Apr. 1, 1936. Instead of sailing N., or N.E., as she was expected to do, she was taken south to Dover. During that period again it seems that discussions took place between the master and crew as to the possibilities of running off with the ship and trading with her, and ultimately selling her. At any rate, she reached Dover on Apr. 4, 1936. The one man chosen by the owners was Jefferson, and after apparently a number of rather unsuccessful little attempts to get rid of him, the master succeeded in leaving him behind and getting off with the ship without an engineer. He had, however, the same number of crew, because both on the setting out on Mar. 31, and on Apr. 1, the master's brother, one Jim Orsborne, had come aboard as a stowaway. I think one may adduce that this was part of the plot then discussed of taking the vessel from her owners. The master, from Dover, had spoken of going to fish on the west coast of Scotland, and at Dover the ship had taken in fresh provisions, and possibly some further fuel. She had provisions when she left Grimsby for 12 days, and fuel for 21 days, if she were fishing, but only for 12 days direct steaming. To go to the west coast of Scotland would take 12 to 14 days direct, or 20 days if she were fishing. Jefferson, who had made a report to the owners after he was left behind, reported the existence on board of the stowaway, Jim Orsborne, and Mr. Moore, the owners' representative, suspected that it was Jim Orsborne, the master's brother, when he heard of the stowaway's presence on the ship. On leaving Dover, the ship had full bunkers and 5 weeks' provisions. It may be accepted that there was no honest reason why the master should go to Dover. The taking of 5 weeks' provisions on board suggested dishonesty, and though it was possible that the master might come back up the east coast and fish in the North Sea, it was unlikely. Thereafter nothing was heard of the vessel for over a month and a half. Mr. Moore said in evidence that he thought that the man had probably

gone, as he described it, on the booze. He knew there was no engineer on board, and he thought there was a considerable possibility of collision and that the ship might have been lost by perils of the sea. By Apr. 20 he was anxious, and suggested that the underwriters should be communicated with, and by Apr. 28 notice of abandonment was given. That notice of abandonment was not accepted by the underwriters, but they agreed to place the owners in the same position as if a writ had been issued. By way of trying to recover the ship in case she had either suffered some casualty, but had not been lost, or in case she had been taken away by her crew, a radio broadcast was issued on Apr. 29, 1936. By Apr. 30, application was made for posting the ship as missing. Lloyd's did not accede to that request, but postponed the matter for 14 days. While that matter was still deferred, there arrived, on May 11, an account in respect of expenditure of the "Girl Pat" from Corcubion, a port in Spain. The communication was to the effect that a disbursement account for the sum of £235 18s. 7d. had been received in respect of the "Girl Pat." That information was afterwards amplified and other information given. Perhaps the shortest method of describing it is that contained in the correspondence :

(1) The account for disbursements discloses that the master is using the name Captain Black, whereas his name is George Black Orsborne. (2) The master gave the name of his owners as Sir Richard Irvin of Aberdeen, whereas the vessel is owned by the Marstrand Fishing Co. of Grimsby. (3) The master gave the port of registration as Aberdeen, whereas the port of registry is Grimsby. (4) The master obtained a cash advance at Corcubion of 8,135 pesetas, which is over £200. (5) It has been stated that the master stated at Corcubion that his vessel was engaged in following Sir Richard Irvin's yacht, which was going down the Mediterranean, and was to catch fish for those on board.

That was the information received, and on that it was submitted by the representatives of the owners that it was clear the master had barratrously taken the vessel, and that she was a loss by barratry. Application for assistance in recovering the vessel was made to the police about that date, and about May 14 telegrams were sent to a large number of Lloyd's agents down a certain distance on the west coast of Africa and also across the Atlantic. On May 18, the owners amended their notice of abandonment by asking that loss by barratry should be substituted as the loss upon which they relied. The document making that request is contained in a separate document, which contains both the original notice of abandonment and the amended notice. The original notice contains at the bottom the following remarks by the underwriters :

Abandonment declined, but to avoid action we hereby agree to place the assured in the same position as if a writ had been issued this day [Apr. 20, 1936].

The second notice, dated May 18, is as follows :

Further to the letter the writer addressed to you yesterday, and in view of the further information received from shipping to-day, we shall be glad if you will amend the notice of abandonment to read "that the owners abandon the 'Girl Pat'

to the underwriters on the ground of the barratry of the master." Will you please also indicate that the owners claim the total amount of the loss insured.

That is annotated :

Note amendment of terms—abandonment declined on previous terms.

It is not absolutely clear from those letters as to whether the second A
letter was a fresh notice of abandonment, speaking from the date
May 18, or an amendment merely of the original abandonment, speaking
from Apr. 28. I do not myself regard the question as to which is the
vital date as being important, but, at any rate, one of those dates is
the date at which the notional issue of the writ must be taken to have B
occurred. Speaking for myself, as I shall indicate later, except as indi-
cating possibilities which might occur to someone at that time as being
likely to happen in the future, I do not regard the future events as being
material in considering whether the assured was entitled to claim for a
constructive total loss, if constructive total loss be the true claim in C
respect of the vessel, but I go on to state those facts as part of the
history of the case. On May 18, a report was received of a vessel having
been seen fishing off the Salvage Islands. Probably that vessel was not
the "Girl Pat." On May 20, the Admiralty were approached, and some
question, though not, to my mind, a very material question, arose as D
to what the Admiralty were prepared to do. It was said on behalf of
the owners that they were not prepared to do anything. It was said
on behalf of the underwriters that if the owners had taken further steps
the Admiralty might have done a great deal. I do not myself see that
they could have done very much, but, at any rate, it appears that they E
suggested a letter should be written, and that Captain Knox-Little, who
had been approached, took the view that at that time the "Girl Pat"
was not likely to get away, but that her recovery would be obtained in
a comparatively short time. However, by May 25 certain of the under-
writers, thinking that the loss was a loss for which they were liable to F
pay, agreed to settle, and a settlement took place. Certain of the under-
writers refused to settle, taking the view that there was no total loss
under the policy, and on May 26, 1936, the writ was issued in the present
action. It appears now, from what has been learned since, that after
leaving Dover the "Girl Pat" put into the shelter of the Channel Islands G
and altered her rig, putting on a bowsprit, and that at that time there
was some discussion about going to Madeira. It also appears that the
engines broke down, and broke down—as perhaps was not altogether
surprising in the absence of an engineer—because the boy who was
shipped as cook, one Stephen, had failed to turn on the lubricating oil. H
The vessel, it also appears, was in Corcubion from Apr. 12, 1936, to
Apr. 24, 1936, and at that time she had blacked out the letters and
numbers on her side, the engines were not in good order, and during a
great portion of that time work on the engines was taking place. It

also appears that the log was falsified, the master using the name of George Black, for instance, and giving false names of the crew. From Corcubion she sailed to Teneriffe, where she was three days, thence to the Salvage Islands, and thence to Port Etienne on the west coast of Africa, where she was from May 11 to 15. After leaving Port Etienne for the first time, she was twice ashore and had to put back. On May 23 she reached Dakar, and there she was reported as having arrived by Lloyd's agent. Telegrams were sent to him, indicating that she ought to be kept and that she probably had been barratrously seized. Steps were taken to keep her, but the master, who had had his engine repaired again, indicated that it was necessary to try the ship in order to see whether he should pay for the engine repairs, and Lloyd's agent, and I think the port authorities, seem to have been prepared to let him try her engines. Perhaps a man a little more alive to the possibilities might not have done so, but, however that may be, they did let him try her engines, and she immediately put to sea and ran away. From that date, a number of rumours were heard, such as that she was in tow of a British ship, that she was making for Cape Verde, and that the master was going to South Africa. None of those rumours in fact was true, and she eventually arrived off Georgetown in British Guiana, and was arrested on June 19, 1936. I might add that the Dakar authorities, though they failed to keep her, like Captain Knox-Little, thought that the vessel was getting to the end of her tether, as the distance she had to travel would be great, and, after all, she had only a certain amount of fuel and stores on board. In those circumstances, the owners claim that the "Girl Pat" was either an actual or constructive total loss by barratry.

First of all, with regard to an actual total loss, it is said that barratry is analogous to capture, and that capture is an actual total loss, though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss. Capture followed by condemnation no doubt was actual total loss, but that was because the vessel had in fact been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. The capture alone I do not think was ever necessarily an actual total loss. It is possible that if the vessel had been carrying contraband and that condemnation was certain, she might be held to be an actual total loss, but I do not think it is certain, even then, that that result would follow. Normally, I think capture is a constructive total loss, and the confusion which has arisen, with regard to whether it is an actual or a constructive total loss, arose merely because, in the earlier cases, the distinction between those two classes of loss was not kept clear. In the same way, damage may

amount to a constructive total loss, but I think will not amount to an actual total loss, though it may amount to an actual total loss if it has been followed by sale so as to make the position one in which the vessel was lost to her owners by the proper sale after sufficient damage to justify it. The class of case I am referring to is *Dean v. Hornby* (1) A and *Stringer v. English & Scottish Marine Insurance Co.* (2). However that may be, whether under the old law capture was or was not an actual or constructive total loss, the case is now governed by the Marine Insurance Act, 1906, ss. 56 to 60. That Act provides in sect. 57, amongst its definitions of "actual total loss," "if the vessel be irretrievably lost." B In my view, no one could say here that the vessel was irretrievably lost to her owners. Under the Marine Insurance Act, loss by barratry is necessarily an actual total loss, and in this case I find there was no actual total loss.

Then comes the question: Was the ship a constructive total loss? C The test there is the test set out in *Polurrian S.S. Co., Ltd. v. Young* (3), which was actually, of course, the test set out in sect. 60 (2) (i): Is the recovery of the vessel unlikely? It is also, I think, conceded—and, at any rate, it has been determined by the *Polurrian* case (3)—that "unlikely" means that the balance of probabilities is against the vessel D being recovered, and also that the person to whom it must appear that the vessel is unlikely to be recovered is not the individual concerned, but is the reasonable man. But that leaves the question: By what information must the person concerned judge? Of course, in giving notice of abandonment, he can only act on such information as he has, and, E indeed, he may act on a reasonable guess, and can recover, providing in fact the recovery of the vessel was unlikely: *G. Cohen, Sons & Co. v. Standard Marine Insurance Co., Ltd.* (4). In determining whether in fact the loss was a constructive total loss, two matters must be determined: (i) at what date must the judgment be exercised? and (ii) is the F accuracy of that judgment to depend upon the facts known to the person forming the judgment at the time he does so, or is it to depend upon the true facts existing at that time? As to the first question: At what date must the judgment be formed, I think the *Polurrian* case (3) determines the question; it is the date of the issue of the writ, or of the G notional issue of the writ; that is to say, the date at which the underwriters agree to treat the matter as if it had been an issue. That, in this particular case, is either Apr. 28 or May 18, and I have said, having regard to my view as to the second question, I do not think it matters in this case which date we take. In fact, I do not know that it matters H in either case which date is taken in this case. The second question, namely, on what must the person making the claim be taken to have acted, depends upon sect. 60 (1), (2) of the Act. If the decision depended upon sect. 60 (2), then the question is: Was the recovery on the proper

- date unlikely or not? *Prima facie*, that means: Was the recovery unlikely on the true facts as then existing and not upon the facts as known to the assured? But it may be said that sect. 60 (2) is a particular instance of which sect. 60 (1) is the general expression, and, if so, the
- A meaning of the general must govern that of the particular which is an instance or example of it. Even if this be so, the phrase in sect. 60 (1)—that is, that there is a constructive total loss when the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable—may mean because, on the facts as known,
- B the vessel's loss appears unavoidable, or because, on the true facts, the loss appears unavoidable. I prefer the latter of those two constructions, (a) because the particular instance in sect. 60 (2) would seem to point to the true facts being the criterion, and (b) because that was, I think, the view accepted in the *Polurrian* case (3). If that be an accurate
- C view, the word "appears" is used because the future of the vessel is still unknown, and her loss must still be described as appearing unavoidable, since certainty can never be predicted of the future. It would be curious if that were not so, since the result of the other would at least be an odd one. One example may suffice. If the decision were
- D to depend on the apparent facts, an owner, whose credible information was that the ship had been driven ashore in such circumstances that her loss appeared to be unavoidable, could give notice of abandonment, issue his writ, and recover, though it was found the next day that the vessel was safe and sound in harbour. To accept that a constructive
- E total loss had occurred in such a case, would be, I think, to hold, as Mr. Willink said, that the insurance had been effected, not against loss, but against bad news. Now the same view seems to be supported by ARNOULD in sect. 1095. Would, then, a prudent owner have come to the conclusion, on the true facts as existing on Apr. 28 or May 18, that
- F the recovery of the "Girl Pat" was unlikely? At that time the master and crew had determined to deprive the owners of her possession, and, I think, of her ownership. There was no competent engineer on board; the engines had broken down twice; the log had been falsified; there was no proper chart on board, and the vessel had reached and sailed
- G from Corcubion after having her rig altered by the addition of a bowsprit and after the blacking out of her fishing numbers and repainting. She was not lost by a peril of the seas, but a clear act of barratry had been committed, and any loss following that barratry would, I think, be a loss by barratry: see ARNOULD, sect. 858. In those circumstances she
- H might have escaped and been sold, or gone ashore, or perhaps been seized by revenue men, or come into collision with another ship. All these things were possible, and, indeed, not unlikely, but I cannot say that, in my view, on a balance of probabilities, she was more likely to be lost than recovered. To my mind, it is a case exactly on all fours

with that of the *Polurrian* (3), her recovery being uncertain, but not unlikely. If I had been asked to say: "Is she more likely to be lost than to be recovered," I should have felt obliged to reply: "I do not know." Nor is the case changed if May 18 is taken as the vital date. By that time she had still eluded capture, though she had been to A Teneriffe, the Salvage Islands, and Port Etienne. By that time she had also been twice ashore outside that port, but she was still afloat, still required fuel and provisions, and was put into some port to get them. Her good fortune in eluding capture so far might not be repeated, and I do not think that the possibility of the master and crew reaching B South America and selling her is enough to turn the scale. So far I have, rightly, I think, excluded all consideration of what occurred after May 18; but, even if I take subsequent events into account up to the date of the recovery in Georgetown, I do not think that I should change my mind. She had made, it is true, one more escape, but my judgment C accords with that of Captain Knox-Little and the port authorities of Dakar, that she was nearing the end of her tether. It is true that the majority of the underwriters paid as for a total loss, but even if I take account of their action, I have to remember that I do not know what view of the law they took, or, indeed, what they took to be expedient to D do, to pay, or to refuse, whatever the law might be. For my part, I am left in complete darkness as to whether the "Girl Pat" was likely or unlikely to be recovered, and I must hold that she was never a constructive total loss and that her owners cannot recover.

On that view, I must dismiss the action with costs. E

Solicitors: *Deacon & Co.*, agents for *Grange & Wintringham*, Grimsby (for the plaintiffs); *Parker, Garrett & Co.* (for the defendant).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law.]

POPULAR CATERING ASSOCIATION, LTD. v. ROMAGNOLI.

[KING'S BENCH DIVISION (Greaves-Lord, J.), **November 13, 1936.**]

Landlord and Tenant—Rent—Suspension of rent—Eviction by title paramount—Demolition under dangerous structure notice—Frustration of lease—Breach of covenant for quiet enjoyment.

A

The defendant was the plaintiffs' tenant of certain premises, which became the subject of a dangerous structure notice served by the London County Council on the defendant and on the plaintiffs' superior landlords. The defendant forwarded the notice to the plaintiffs, but it was not complied with. Two further notices were served and demolition orders obtained. Eventually the county council entered the premises and under their powers under the London Building Act, 1930, s. 133, carried out the work necessary to comply with the dangerous structure notices, and in the course of such work they demolished and pulled down two storeys of the premises. In an action for arrears of rent, the defendant pleaded that he had been evicted from part of the premises by the London County Council on the default of the plaintiffs, and that such eviction constituted eviction by title paramount. Alternatively he pleaded that the eviction was due to the act or default of the plaintiffs in permitting the premises to become dangerous, and/or in omitting to remedy the dangerous condition of the premises, and/or in failing in breach of statutory duty to comply with the dangerous structure notices and demolition orders, and he pleaded that the lease was frustrated. The defendant counterclaimed an apportionment and reduction of the rent payable and damages for breach of the plaintiffs' covenant for quiet enjoyment :—

B

C

D

HELD : (i) there was no eviction of the defendant by title paramount.

(ii) there was no frustration of the lease.

(iii) there had been no breach of the plaintiffs' covenant for quiet enjoyment, and the defendant was liable for the full amount of the rent.

E

EDITORIAL NOTE. The point at issue here is the short one of whether upon the demolition of part of the demised premises as a dangerous structure, the tenant is entitled to any remission of rent. It is held that there is neither eviction nor frustration of the contract of letting nor a breach of the covenant for quiet enjoyment and the tenant remains liable for the full rent.

F

AS TO SUSPENSION OF RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 175-178, paras. 193-197 ; and FOR CASES, see DIGEST, Vol. 31, pp. 251-253, Nos. 3895-3925.]

G

ACTION for £199 18s. arrears of rent of leasehold premises, No. 10, St. John Street, West Smithfield, London, payable under a lease dated May 16, 1930.

H

The plaintiffs, who were lessees of the premises under a lease dated Sept. 21, 1921, and had carried on business as caterers, having decided to go into liquidation, sold the goodwill of the business, and on May 16, 1930, granted an underlease of the premises to the defendant at the yearly rent of £120. This underlease contained *inter alia* the following covenant by the lessee :

And will at all times during the said term at his own expense keep the said

demised premises in good and substantial repair (damage by fire or explosion excepted).

And the lessor covenanted *inter alia* :

(a) That the lessee paying the said rent and observing and performing the covenants by the lessee herein contained may peaceably hold and enjoy the said premises during the said term without any interruption by the lessor or any person claiming by through under or in trust for him ; (b) That the lessee is not to be held responsible for any settlements in the structure or for the maintenance of the main timbers walls or structure or for repairs required thereto through age or decay or unless the same are occasioned through the negligence of the lessee his under-tenants or servants.

On Dec. 15, 1930, a dangerous structure notice was served on the defendant and on the freeholders. The defendant forwarded the notice to the plaintiffs and took no further steps. A second dangerous structure notice was served on the defendant on Apr. 25, 1931, and a third dangerous structure notice was served on him on July 30, 1931. Summary proceedings had been taken to enforce these dangerous structure notices, and, when the third notice remained uncomplished with, the London County Council, acting under its powers under the London Building Act, 1930, s. 133, entered upon the premises and carried out the work necessary to comply with the dangerous structure notices. In the course of such work the London County Council demolished and pulled down the upper two storeys of the premises. The account for the expenses of this work was sent to the defendant, who forwarded it to the plaintiffs. The London County Council obtained an order for the recovery of the expenses from the defendant, and the defendant paid to the council sums amounting to £172 8s. in respect of such expenses. In reply to demands for payment of rent, the defendant claimed to deduct from the rent the amount paid to the London County Council.

Correspondence had passed between the parties in 1931 as to the condition of the premises, and the plaintiff had endeavoured to have the rent reduced on the ground that the upper part of the premises was uninhabitable. The plaintiffs, in the absence of any concession by the freeholders as to the rent, refused to reduce the defendant's rent. The defendant paid £20 for rent in July, 1931, and a further £20 in Sept., 1931, both which sums were accepted "without prejudice." A further £20 was sent in Dec., 1931, which the plaintiffs accepted on account of arrears. The plaintiffs now claimed the rent in arrear which they alleged to be due to them.

The defendant by his defence pleaded that he had been evicted from part of the premises by the London County Council on the default of the plaintiffs, and that such eviction constituted eviction by title paramount. Alternatively, he pleaded that the eviction was due to the act or default of the plaintiffs in permitting the premises to become dangerous, and/or in omitting to remedy the dangerous condition of the premises and/or in failing in breach of statutory duty to comply

with the dangerous structure notices and demolition orders. The defendant counterclaimed an apportionment and reduction of the rent payable under the lease as from June, 1931, and damages for breach of the plaintiffs' covenant for quiet enjoyment.

- A *T. J. Sophian*, for the plaintiffs.
Neil Lawson, for the defendant.

GREAVES-LORD, J.: I do not think the defendant has any real case. The plaintiffs were the lessees of certain premises at Nos. 8 and 10, St. John Street, West Smithfield, and on May 16, 1930, having decided to wind up the business which they had carried on at that address as caterers, agreed to sell the goodwill of that business and to grant an underlease of those premises to the defendant. That lease was a lease for 12 years and there was a repairing covenant so far as the lessee was concerned. For a time all the covenants were complied with, but shortly after these premises, which were very old, became the subject of a dangerous structure notice by the London County Council. That dangerous structure notice was served upon the premises and also upon the principal lessors. The defendant took no notice of it, but he brought it to the notice of the plaintiffs. In course of time a second dangerous structure notice was served, and later a third notice, none of which was complied with. The county council then, under their powers under the London Building Act, 1930, s. 133, entered upon the premises and carried out the work which was necessary to comply with the dangerous structure notice, and it is admitted that nothing was done which went beyond that which was necessary to comply with the dangerous structure notice. That is the definite requirement with which the London County Council must comply if they enter under that section and, therefore, there is no ground for saying that anything was done by the London County Council which was beyond their statutory powers, or in fact beyond their statutory duty. There is no doubt that the work which the London County Council carried out quite properly within this section made a substantial alteration in the amenities and in the advantages which the defendant had originally under his lease, and the defendant says "That being so, I am not going to pay my rent," and he tried for a long time to apportion his rent. In fact, when the London County Council tried to enforce payment of these expenses, the defendant made an arrangement which was in practice exactly the arrangement which is contemplated by the London Building Act, and they allowed the defendant to pay them the expenses in the first place, and that was treated as between the defendant and the plaintiffs, the immediate landlords, as being money which could be deducted by the defendant from his payment of rent, and all that remains is the question of the

balance of rent. It is said that this action of the county council amounts to an eviction by title paramount. I am perfectly well satisfied that this is not an eviction by title paramount at all, and there is nothing in what has taken place which excuses the defendant from his obligation to pay rent under his covenant in the underlease. It is said further A that what has taken place amounts to a frustration of the lease. I am satisfied that the facts of this case do not bring into application any of the principles which have been held to be a ground for considering events as frustration. Therefore, those two defences do not apply.

Then it is said—and this is raised by way of counterclaim, “Oh, B but by what has taken place you have committed a breach of the covenant for quiet enjoyment which was contained in the lease.” What has taken place is that the county council have carried out their statutory powers. There is nothing, in my opinion, which constitutes this action of the C county council in any sense a breach, authorised or carried out by the plaintiffs, of their covenant for quiet enjoyment. That being so, so far as that is relied upon in any way as a defence or as a cause of action for counterclaim in my opinion it fails. Therefore my judgment here is, although regretfully, for the plaintiffs, with costs, and the counterclaim D will be dismissed with costs also.

Solicitors : *Guscotte, Fowler & Cox* (for the plaintiffs) ; *Butt & Bowyer* (for the defendant).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

Followed. SMITHWICK
v. NAT. COAL BOARD
[1950] 2 K. B. 335

WALKER v. BLETCHLEY FLETTONS, LTD.

[KING'S BENCH DIVISION (du Parcq, J.), **November 12, 13, 1936.**]

Factories and Workshops—Dangerous machinery—Fencing—Unfenced wheel of excavator—Criterion by which danger determined—Factory and Workshop Act, 1901 (c. 22), s. 10. F

The plaintiff was employed by the defendants, a firm of brickmakers, and was being taught to drive a mechanical excavator. When going, as he was entitled to do, to the tool-box, he slipped and his leg was caught and severely injured by a wheel of the machine which was not cased or fenced. No negligence on the part of anyone was alleged. G The plaintiff claimed that the absence of fencing made the machine a dangerous machine, and claimed damages for breach of statutory duty :—

HELD : in considering whether machinery is dangerous, it must not be assumed that everybody will always be careful. A part of a machine is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in H circumstances which may be reasonably expected to occur. In the circumstances the part of the machine complained of was a dangerous one within the Factory and Workshop Act, 1901, s. 10.

[EDITORIAL NOTE.] The judgment in this case deals very carefully with the question of what is a dangerous part of a machine within the Factory and Workshop

Act, 1901, s. 10. A part of a machine cannot be safe on Monday and dangerous on Tuesday, merely because an accident has happened on the Tuesday. There must therefore be some criterion of danger apart from the mere happening of the accident, and it is stated that a part of a machine is dangerous if it can be a possible cause of injury to anyone acting reasonably.

A AS TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to:

- B (1) *Hindle v. Birtwistle*, [1897] 1 Q.B. 192; 24 Digest, 909, 71.
(2) *Higgins v. Harrison* (1932), 25 B.W.C.C. 113; Digest Supp.

ACTION for damages for breach of statutory duty under the Factory and Workshop Act, 1901, s. 10.

C The plaintiff, who had been for some time employed by the defendants as a labourer, was being taught to drive a mechanical excavator. He was quite properly going to the tool-box of the machine to fetch what was required for oiling and greasing it, when he slipped and fell. His leg was caught in a wheel of the machine and so severely injured that it had to be amputated. It was not suggested that anyone was negligent, but the plaintiff contended that the wheel was a dangerous part of the machine and ought to have been fenced.

D *F. P. M. Schiller, K.C.*, and *Stephen Chapman*, for the plaintiff.
F. A. Sellers, K.C., and *James MacMillan*, for the defendants.

E DU PARCQ, J.: This is an action brought by Mr. Benjamin Ernest Walker against a limited liability company, Bletchley Flettons, Ltd. The plaintiff was employed by the defendants, who are brickmakers, as a learner-driver. He had been employed by them for some time as a labourer, and he was being taught to drive a mechanical excavator. He had been put under the tuition of another man, who was an experienced driver, and he was learning (and nobody suggests he was not learning as quickly as might be expected) to drive and work this excavator.

F Plans and photographs have been put in, and I do not think it is necessary for me to attempt to describe this machine except in general terms. Inside the lower cab, as it is called, where this accident happened, is a gear wheel which, when the machinery is started, revolves, at first slowly, and afterwards faster, though never fast. That gear wheel is partly surrounded by casing, but in the casing there are gaps. The reason why there are those gaps in the casing is two-fold. First, it makes the casing lighter, which is an advantage, and, secondly, it makes inspection easier. There would be no difficulty in covering those spaces with a wire guard or some other efficient protection, and no great expense would be attached to it, and the fact that the spaces were not so covered is not due, I am sure, to any false economy or parsimony on the part of the employers.

On Feb. 20 of this year the plaintiff was working in the cab in the early hours of the morning, having been on a night shift, with his fellow-workman, Heath. Heath started the machinery by pressing a button, though not with the intention of starting the machinery. He was not aware that the clutch had been left in, as it had been, and, whether an accident happened or not, he would immediately have stopped the working of the machinery when he discovered that the clutch had been left in, because it would not have been wise to start the machinery in those circumstances at that moment. But, in fact, he stopped it for another reason. No sooner had he started the machinery working than he heard a moan, which came from the plaintiff, and what had happened to the plaintiff seems to be this. He was going, as he was quite entitled to do in the course of his work, to the tool-box to fetch what was required for the purpose of oiling and greasing the machinery. He did not get to the tool-box. When he was near the oil-feed, which is marked on the plan, he slipped. He may have slipped, and I think it is probable he did slip, on a patch of oil. Whether he slipped on a patch of oil or not, he slipped. That is undoubted, and I accept his evidence about this ; I have no doubt he is speaking the truth. He fell on the small of his back, he says, in this narrow passage, the width of which is 2 ft. 4½ ins., and as he fell his legs, not very surprisingly as it seems to me, shot into the air. If there had been a casing there which completely covered the wheel, his leg would have been brought up sharp against the casing, but, as it happened, where his leg shot out there was a gap in the casing, his leg went through it, and was caught by the wheel and very terribly injured, so that shortly afterwards it had to be amputated.

That is really the whole of the story. Upon that, the question, and the only question, which arises is, were those unfortunate injuries the direct consequence of a breach on the part of the defendants of a statutory duty imposed upon the defendants ? Sect. 10 of the Factory and Workshop Act, 1901, so far as it is material to this case (and I need only read very little of it) is in these words :

(1) With respect to the fencing of machinery in a factory, the following provisions shall have effect : . . . (c) All dangerous parts of the machinery . . . must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced.

The English is not quite perfect, but that must be the meaning of the subsection.

The plaintiff's case is this. There is no dispute that within the meaning of the Act this was a factory. This wheel is part of the machinery, and, the plaintiff alleges, a dangerous part of it. It was not securely fenced, and it was not in such a position or of such construction as to be equally safe as it would have been if it had been securely fenced. The discussion

has turned upon the question whether the evidence ought to satisfy me that this was a dangerous part of the machinery. If it was, I think it cannot be doubted that it was not securely fenced, and, if it was not securely fenced, it was not in such a position or of such construction
A as to be equally safe as if it had been securely fenced.

Before I express any view as to the way in which those words "dangerous parts of the machinery" ought to be construed, I think it right to say a few words about the evidence in the case. I have had the assistance, which I value, of the evidence of several gentlemen of
B experience. First I heard Mr. Thomas. Mr. Thomas is an engineer, with high qualifications and of great experience. Everybody recognises that the opinions of professional men may differ, and I dare say it is quite true to say that Mr. Thomas takes a stricter view about machinery than the view entertained by other equally proficient and equally honest
C experts. What Mr. Thomas says, as I understand him, is that, apart from this accident, with his knowledge of machines of this kind and machines which may be regarded as comparable with them for the present purpose, he considers, and would have considered before February of this year, that this was a dangerous part of the machinery. He told
D me that he had known accidents happen and injury suffered through similar wheels in rolling-mills. The position in the rolling-mill is not precisely the same as the position in one of these mechanical excavators, but the two cases might, he thought, not unfairly be compared. He said, also, that in his experience of rolling-mills it was common to have
E fencing in cases comparable with this. He gave an instance from Gors Eynon, which is not far from Swansea, of tin-plate making and steel-rolling works in South Wales. He said: "Looking at the matter apart from this accident, here you have an excavator, which, though it never moved very fast, had a very narrow passage-way with a surface upon
F which, though one would not say it was very slippery, there was always the possibility of slipping, where there was the possibility that you might find (as there was in this case) a little pool of oil, which would make the probability that someone might slip so much the greater; and if anyone once lost his balance, then it is very difficult to say what
G might happen to his arm or leg, and is certainly not beyond the bounds of possibility, and, indeed, beyond the bounds of reasonable probability, that an arm or a leg might in some way get through one of these spaces and so suffer injury. That is as I understood him; I am, of course, paraphrasing what he says. He honestly thinks that he would
H have been prepared, if no accident such as this had happened, to condemn this as a dangerous machine in its unfenced state—or insecurely fenced state, I should say.

On the other hand, I had evidence from a most experienced and capable witness, Mr. Owner, who had many years of experience as a

factory inspector and has kept himself up to date since he retired from that position, and probably knows as much about decisions of the courts in these matters, and the practice in factories, as most people. Mr. Owner took the view that, not only would he have not said before the accident that it was a dangerous part of the machinery, but also he would not say so now, in this sense, that he would not, if he were a factory inspector now, think it his duty to say, "You must fence this machine." At the same time, with great candour, when he was asked about it in cross-examination he said to Mr. Schiller—I am not using his exact words—that, although he would have thought before the accident that no accident could happen, this accident has proved that he was wrong. Then other witnesses were called. Some of them did not say very much. That is not the fault of those who called them, nor is it their's. Nobody is to blame for that. And I am not sure if they all said exactly what it was anticipated they would say. However that may be, I refer, for instance, to the evidence of Mr. Rowley, a factory inspector. He was asked whether this kind of frame, which has been referred to as an A frame, was not in common use without fencing, and he said he would not like to say it was. So he did not accept that. He said it probably was, in connection with excavators, and I ought to have said that Mr. Thomas himself said he had never seen any sort of fencing on excavators like this. When he was cross-examined Mr. Rowley said, now (and that means having regard to the accident) his view was that, in the case of this excavator and others like it, there should be a guard. Mr. Ingall, the safety officer of a brick company, said that the company with which he is connected had two excavators of exactly this type in its possession, and he had not thought any guard necessary, "but," he said, "I should certainly recommend guards now." Then another gentleman, Mr. Baker, said that, so far as his firm was concerned, it would certainly consider the matter of a guard, although it had not come to any conclusion yet; and there was other evidence to the effect that this type of frame was practically universal, and it was not usual to find, indeed, one never did find, such a fence on such an excavator.

In those circumstances, I have to consider whether this was a dangerous part of the machinery. I have been referred to a decision of the divisional court in the case of *Hindle v. Birtwistle* (1). In that case, an accident occurred owing to a shuttle flying from a loom in a cotton factory. It appeared that there had been negligence on the part of the weaver in charge of the machine. The owners of the factory had been prosecuted before the magistrates on a charge of failing to fence a dangerous part of the machinery, and the magistrates had convicted them. They appealed to the court of quarter sessions, where the learned recorder, quashed the conviction, stating a case for the opinion of the High Court,

the learned recorder being of the opinion that the owner of the factory was responsible only for machinery which was in itself dangerous in the ordinary course of careful working. The divisional court held—and I think this is the essence of their decision—that it was not a defence

- A which would avail the respondents in that case, the owners of the factory, to say and to prove that the machinery was perfectly safe so long as it was worked with proper care. What, in effect, the court said was this : In considering whether machinery is dangerous you must not assume that everybody will always be careful ; you ought to assume
B that somebody will sometimes be careless. WILLS, J., said, at p. 195 :

In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration.

But at p. 195 of his judgment WILLS, J., used these words also, and they have been much relied upon in this case by Mr. Sellers :

- C It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection.

With great respect, I entirely accept that, and, indeed, I think I am bound to accept it. I certainly do accept it without any reluctance, but

- D I think one must be a little careful to see just what it means. It was rather suggested by Mr. Sellers (and, in my view, it cannot be right) that, in considering whether the defendants had been guilty of a breach of their statutory duty to fence all dangerous parts of machinery, the question was precisely the same as it would be if I were considering,
E apart from this statute, whether the defendants had been negligent in not fencing that machinery. Undoubtedly the questions are very nearly the same, and the matters to be considered may be sometimes very much the same, but there is clearly, in my view, a distinction to be drawn. I think if I were to venture to expand a little what was said
F by WILLS, J., I would say, and I think I am saying nothing inconsistent with what that learned judge said, that a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur.

- G If the question were one put to a jury, negligence or no negligence, the question one would ask oneself is : Did the employers omit to do something which a reasonable man would have done ? and a jury might say that it was too much to expect a reasonable man to think of the possibility of that happening which happened in this case, because
H one can think of cases where, although some people did anticipate danger, and others would have anticipated danger if they had applied their minds a little more carefully to the question, still there was no such consensus of opinion among reasonable men as would make one say that a jury must find, if they were themselves reasonable men, that there had been

a failure on the part of the defendants to take proper precautions because they did not come up to the higher standard of care. When one is considering negligence, it may be that one would say that, down to the date of this accident, no one could say that it was an unreasonable omission to have no fencing. After the date of this accident, everybody would say that it was an unreasonable omission. What was not negligent on Monday was negligent on Tuesday because the stock of human experience had had an addition made to it between those two days; but I am bound to say that it seems to me impossible to hold, looking at this Act, that a part of the machinery which was dangerous on Tuesday, the machinery and all the surrounding circumstances having been exactly the same on Monday, was not dangerous on Monday. The truth is, as has been said in these cases, that the mere fact of an accident happening in connection with machinery does not show whether the machinery is dangerous at all. A very good instance of that is to be found in the case to which Mr. Sellers referred me of *Higgins v. Harrison* (2). There an unfortunate accident happened to a young girl who had gone groping about on the floor, quite unnecessarily, near part of a machine to which nobody could possibly contemplate, by the wildest stretch of imagination, anybody would go, and if there had been not only one, but fifty accidents of that kind, one might still have said that it did not mean the machine was dangerous, because, if I may refer again to what I said just now, there was no possibility of anyone being injured who acted in a way in which a human being might reasonably be expected to act. Everybody expects human beings to be careless sometimes, but nobody expects human beings to be so extravagantly careless as to touch some part of the machine which it is not only not difficult to avoid, but which it is actually difficult to get near. On the other hand, it seems to me plain that machinery may be dangerous, and may properly be held to be dangerous, although no accident has occurred in connection with it at all. It is no use saying: We have found by experience that accidents do not happen, if a reasonable amount of reflection as to the possibilities of the case will show anybody that an accident might happen without assuming any wildly improbable behaviour on the part of anybody or any extraordinary unlikely circumstances.

In this case, I am satisfied, to use the words of WILLS, J., that it would have been perfectly true to say, at the beginning of this year, before there had been any accident, of this machinery: In the ordinary course of human affairs, danger may be reasonably anticipated from the use of this machine without protection. I believe Mr. Thomas when he says that he would have said that. I believe Mr. Owner when he says that he would not have said that. Events have shown (and I cannot disregard the accident for this purpose) that Mr. Thomas would have

been right and Mr. Owner would have been wrong. If this accident had been one in any way comparable to the accident in the case of *Higgins v. Harrison* (2), it would not have shown Mr. Thomas to have been wrong and Mr. Owner to have been right in the very least ; but,

A when I look at this accident, I see nothing in it to show me that the more gloomy anticipations of Mr. Thomas would not have been reasonably entertained. Of course, it is true of this accident, as of every accident, that it is extraordinary in this sense, that, if you take every detail of the circumstances, it is probably, perhaps it is not putting it too high

B to say, unique in the history of the world. That is probably true of every accident that occurs because of a collision between a motor car and a pedestrian, if it is any consolation to a pedestrian who has fallen and been injured to know that he has fallen and been injured in a way which is a little different from the way in which any other pedestrian

C has fallen and been injured. Nobody could possibly have anticipated the precise way in which this man would slip and fall, the precise part of his anatomy which might get through these spaces, and exactly what would happen to it if it did. But, accepting, as I do, what Mr. Thomas says about roller-mills and the machinery there, it does seem to me that

D there was a very real possibility that one of these men, working in this confined space, might fall. There was nothing remarkable in his falling on his back. It was not even particularly extraordinary that he should fall in a position which sent one of his legs through the gap, and I cannot but think that anybody applying his mind to it would have said : It

E is obviously much safer that these gaps should be covered over.

When I say that this machinery is dangerous, I do not mean that if you do not fence it accidents will happen monthly, or even yearly. There is an old proverb about the pitcher that goes many times to the well, and sometimes the pitcher never gets broken, but I can hardly

F think it is true to say (I am satisfied that it is not) that if in future there were no fencing used on machines of this kind, anybody could say with any feeling of assurance there might not be other accidents, similar to this, with consequences perhaps equally grave. Applying, as I think, the words used by WILLS, J., though, indeed, they were

G used in a different context, and without saying anything in the least inconsistent with what has been said in other cases, and, I may add, speaking from some recollection of cases, not actually reported, in the Crown Paper of the divisional court, I am satisfied that this was a dangerous part of the machinery.

H That disposes of the case so far as liability is concerned, and it is unnecessary for me to express, and I do not express, any opinion about the other parts of the section as to which I heard an argument from Mr. Schiller and Mr. Sellers. There was no suggestion that there was any negligence of any kind on the part of the plaintiff or, indeed, of anybody

else. [His Lordship considered the question of damages.] I have come to the conclusion that the sum of £2,200 should be paid as the amount of the total damages, and there will be judgment for that amount.

Solicitors: *A. E. Wyeth & Co.* (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

WOOLF v. FREEMAN.

[KING'S BENCH DIVISION (Macnaghten, J.), December 4, 1936.]

Gaming—Club—Card games—Counters sold on credit to member—Winner paid by club on behalf of loser—Action by proprietor of club against loser for amounts so paid and price of counters—Gaming Act, 1845 (c. 109), s. 18—Gaming Act, 1892 (c. 9), s. 1.

The plaintiff was the proprietor of a club where card games were played for money, chips or counters being used for money in the actual play. The defendant purchased from the club chips to the value of £30 for which he gave the cheque of a third party, which was subsequently dishonoured. There was a practice in the club whereby, in the event of the loser having insufficient chips to pay his losses, both winner and loser proceeded to the office of the club and the office paid the sum agreed as won direct to the winner. The office had so paid £18 19s. on behalf of the defendant. In an action for £30, the price of the counters, or, alternatively, for the same sum as money lent, and for the sum of £18 19s., money lent:—

HELD: (i) the giving of the counters on credit was a transaction in the nature of a promise void and unenforceable under the Gaming Act, 1892, s. 1, as it was a promise to pay money paid under contracts void under the Gaming Act, 1845, s. 18.

(ii) the sum of £18 19s., being paid direct to the person who had already won the money upon wagers, was money lent to the defendant for the purpose of gaming or wagering and therefore irrecoverable under the Gaming Acts.

(iii) bridge is not an unlawful game, but *quære* whether poker is an unlawful game.

[EDITORIAL NOTE.] The practice of using chips or counters for money in gaming is well known. It was sought in the present case to set up the exchange of money for counters at the office of a gaming club as a sale of goods, but this contention was rejected. Such a proceeding must be treated as a loan of money for the purpose of gaming. In the second part of the case, where money was paid on the loser's behalf direct to the winner, the case of *Re O'Shea, Ex p. Lancaster* (1) was distinguished, since in that case the money was paid to the loser. Where it is paid to the winner, such a payment is within the Gaming Acts and irrecoverable.

AS TO LOANS FOR GAMING PURPOSES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 486, 487, paras. 885, 886; and FOR CASES, see DIGEST, Vol. 25, pp. 414-416, Nos. 180-192.]

Cases referred to:

- (1) *Re O'Shea, Ex p. Lancaster*, [1911] 2 K.B. 981; 25 Digest 415, 192.
- (2) *Tatam v. Reeve*, [1893] 1 Q.B. 44; 25 Digest 411, 146.
- (3) *Shoolbred v. Roberts*, [1900] 2 Q.B. 497; 25 Digest 407, 107.
- (4) *Carlton Hall Club v. Lawrence*, [1929] 2 K.B. 153; Digest Supp.
- (5) *R. v. O.K. Social & Whist Club, Ltd.* (1929), 45 T.L.R. 570; Digest Supp.

(6) *Jenks v. Turpin* (1884), 13 Q.B.D. 505; 25 Digest 423, 260.

(7) *Davis v. Parker*, [1931] 2 K.B. 210; Digest Supp.

ACTION for balance of money lent and the price of food and goods supplied by the plaintiff to the defendant, tried as a short cause under

A R.S.C., Ord. 14, r. 8a.

The plaintiff was the proprietor of a bridge club, of which the defendant was a member. The club was patronised by persons desirous of playing bridge or poker for money. The practice was for members to purchase chips or counters corresponding to sums of money from the proprietor
B of the club in exchange for their equivalent in money. These chips or counters were used as stakes in the play, and could be exchanged with the proprietor for money of a corresponding amount. The proprietor also sold food to the members and gave credit to them in various ways, particularly by advancing chips or counters to them; and this, usually,
C by giving chips or counters directly to the winners on behalf of the losers. At the close of play each day, the players received from the office of the club the value of the chips they returned. On Mar. 14, 1935, the defendant obtained from the club £3 10s. in cash, and chips or counters to the value of £30, and gave in return a cheque for £33 10s., drawn and
D indorsed by a third party. This cheque was dishonoured. At various times the plaintiff had paid on behalf of the defendant sums amounting to £18 19s. under the following circumstances. In cases where a loser had insufficient chips or counters to pay his losses to the winner, both went to the office of the club and the club paid the winner and gave credit for
E the amount so paid to the loser. In such circumstances, such sum of £18 19s. had been advanced to, or paid on behalf of, the defendant. The plaintiff claimed these various sums as money lent, and in the alternative he claimed £33 10s. as damages arising out of the dishonour of the cheque, and in the alternative for goods supplied, treating the
F counters as goods supplied; but this view of the transaction was abandoned in the course of the argument.

The defendant, in his affidavit in opposition to the application for summary judgment, admitted the claim for 10s. 2d. for food supplied, but as to the other sums pleaded that they were loans for gaming purposes,
G and irrecoverable under the Gaming Acts.

The Gaming Act, 1845, s. 18, enacts as follows:

All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands
H of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

The Gaming Act, 1892, s. 1, enacts as follows:

Any promise, express or implied, to pay any person any sum of money paid by

him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

C. Doughty, K.C., and C. J. A. Doughty, for the plaintiff : As the cheque A was not indorsed by the defendant, no action lies against the defendant on the cheque ; the claim is therefore for money lent or goods supplied. The games played were bridge and poker, and these are not unlawful games. Collateral transactions were therefore not vitiated. The club premises were not a gaming house so as to make all wagering thereon B unlawful. Debts incurred to pay losses already incurred are recoverable. [Counsel referred to *HALSBURY*, Hailsham Edn., Vol. 15, pp. 486, 487, para. 886 ; *Re O'Shea, Ex p. Lancaster* (1), *Tatam v. Reeve* (2), *Shoolbred v. Roberts* (3), *Carlton Hall Club v. Laurence* (4).]

I. Springer, for the defendant : The games here played are unlawful C games, and therefore the loans are irrecoverable. The club is a gaming house, and the wagers are therefore illegal. The direct payment to the loser distinguished this case from the cases where payments in respect of losses already incurred were held to be recoverable. [Counsel referred to *R. v. O.K. Social & Whist Club, Ltd.* (5), *Jenks v. Turpin* (6), *Davis D v. Parker* (7).]

MACNAGHTEN, J. : In this case the plaintiff sues the defendant in order to recover £52 19s. 2d., a sum made up of various items. A sum of 10s. 2d. for refreshments supplied is admitted. A claim for E £3 10s. for money alleged to have been lent in cash on Mar. 14, 1935, has not been discussed. There is then a claim by the plaintiff for £30 as the price of counters or chips supplied on the same day. The last claim is one for £18 19s. made up of various sums paid by the plaintiff to the defendant in the following circumstances. The plaintiff is the F proprietor of a club, the object of which is to enable persons to play games of cards, most often bridge, but also poker, for money. The rules of the club show that it is open at various hours, mostly in the evening, but there is no evening session on Fridays. It is a rule of the club that losses incurred by one member to another shall be paid not in G money, but in chips or counters, which can be bought at the office of the club for their equivalent in cash. When the players had finished their play, they went to the office and received from the office the face value of the chips or counters which they retained. Sometimes it happens that a player loses a sum in excess of the chips purchased. Strictly H speaking he ought to go and buy more chips. The plaintiff says that the usual practice is for the winner and loser to go together to the office and agree the amount due to the winner, and the office pays the amount agreed to the winner. The office looks to the loser for repayment of

the amount so paid. Amounts totalling £18 19s. had thus been paid at the office by the plaintiff on behalf of the defendant.

A The sum of £30 paid on Mar. 14, 1935, is the price of chips supplied on credit to the defendant. In respect of this sum and £3 10s., money lent, the plaintiff received a cheque of a third party for £33 10s., which was not honoured. The plaintiff is not suing on the cheque, but for £3 10s., money lent, and for £30, the price of counters and chips supplied.

B For my part, I see no answer to the claim for £3 10s., as there is nothing to show that the money was not lent to the defendant for a perfectly lawful purpose.

C As to the claim for £30 for counters sold on credit to enable the defendant to play cards for money, it is said that bridge is an unlawful game. It is certainly lawful to play bridge. In playing games of cards some skill is required. Bridge is a game of skill, but whether poker is a game of skill is more questionable. Bluff rather than skill appears to be the quality which is useful therein. The main objection raised on behalf of the defendant is that counters received on credit for the purpose of paying losses incurred in a game of bridge would be a debt which is void and unenforceable under the Gaming Act, 1892, s. 1.

D Such a transaction was in effect a promise to pay the plaintiff money paid by him in respect of contracts made void by the Gaming Act, 1845, s. 18. Now, in my opinion, that argument is right. Here is a man carrying on a club for the purpose of gaming or wagering at cards, and if the proprietor of such a club chooses to sell his chips on credit, or for

E a security which proves to be of no avail, then it seems to me that he cannot have resort to a court of law to enforce the obligation of that member. Therefore the sum of £30 for chips cannot be recovered by reason of the Gaming Acts.

F The claim for £18 19s. stands in a different position. It is said that this was lent by the plaintiff to the defendant not for the purpose of discharging gaming debts thereafter to be incurred by the defendant, but for the purpose of discharging gaming losses already incurred by him. Mr. Doughty here strongly relies on the case of *Re O'Shea, Ex p. Lancaster* (1) as establishing the proposition that such a loan is one

G recoverable in law. In my view, the answer given on behalf of the defendant to that contention is effective. That case is distinguishable from the present in this way. In that case the money was paid to the person who had lost. Here it was paid to the person who had won. There is nothing in the case of *Re O'Shea, Ex p. Lancaster* (1) to show

H that, if the appellant there had paid the winner of the bets on behalf of the debtor and had then sought to recover from the debtor the amount so paid, the latter could not have successfully pleaded the Gaming Acts. That case, therefore, does not help the plaintiff, and, having chosen to pay to other persons in the club debts incurred by the defendant

to them, he cannot now recover the amount from the defendant in a court of law. He can only rely upon the sense of honour which is said to exist among people who engage in that sort of gaming. I therefore give judgment for the plaintiff in respect of the first two items only, and he is entitled to recover the sum of £4 0s. 2d. There will be no order A as to costs.

Solicitors : *Edgar H. Hiscocks* (for the plaintiff) ; *W. R. Bennett & Co* (for the defendant).

[*Reported by* GERALD ABRAHAMS, ESQ., *Barrister-at-Law.*]

THE WORSHIPFUL COMPANY OF CARPENTERS OF THE
CITY OF LONDON v. THE BRITISH MUTUAL BANKING
CO., LTD.

[KING'S BENCH DIVISION (Branson, J.), December 15, 1936.]

A *Bankers—Cheques—Fictitious payee—Forged indorsement—Accounts of company and employee at same bank—Bank having no branches—Statutory protection—Stamp Act, 1853 (c. 59), s. 19—Bills of Exchange Act, 1882 (c. 61), ss. 60, 79 (2), 82.*

The plaintiffs, as managers of a convalescent home, kept an account with the defendant bank. The plaintiffs employed a secretary of the committee which managed the home, who kept his personal account with the defendants. By a series of frauds the secretary misappropriated cheques amounting to over £4,000, which were the property of the plaintiffs and which he contrived to have placed to his account with the defendants in the following manner. The cheques, which were crossed, were all properly signed by the plaintiffs' proper officers and in most cases were drawn to people who had supplied goods to the home, in which cases the secretary forged an indorsement or procured a forged indorsement of the payee and paid the cheques into the defendant bank, asking the bank to credit his account with the amount of the cheques. In other cases the secretary procured cheques to be drawn in payment of forged invoices in favour of fictitious persons, and in these cases the indorsements were similarly forged and the amounts of the cheques credited to the secretary's account. In an action for conversion, the defendants pleaded (i) that the payees were non-existent persons and that the secretary was the bearer of the cheques, (ii) that they had paid the cheques in good faith in the ordinary course of business and were protected by the Bills of Exchange Act, 1882, and the Stamp Act, 1853, and (iii) that the cheques were crossed and that they received payment thereof for a customer in good faith and without negligence :—

HELD: (i) the defendants were negligent, and were therefore not protected by the Bills of Exchange Act, 1882, s. 82.

(ii) the transactions were carried through in the ordinary course of business, and, notwithstanding negligence, the defendants were protected by the Bills of Exchange Act, 1882, s. 60, and by the Stamp Act, 1853, s. 19.

(iii) the Bills of Exchange Act, 1882, s. 79 (2), as to the payment of a crossed cheque otherwise than to a banker, does not apply to a case where only one bank is involved in the transaction. That section did not, therefore, apply in the present case.

(iv) the Stamp Act, 1853, s. 19, is not impliedly repealed by the Bills of Exchange Act, 1882, s. 60.

[EDITORIAL NOTE. The question of negligence in this case is covered by the decision in *Lloyds Bank, Ltd. v. Savory* (1), and the interest in the case lies in the fact that the defendant bank had no branch and all that happened took place at its one and only office. It is held that the Bills of Exchange Act, 1882, s. 79, does not apply to such a case. The words "in the ordinary course of business" have not the same meaning as "in good faith and without negligence," and a finding of negligence on the part of the bank does not prevent the transaction being in the ordinary course of business.

AS TO PROTECTION OF A BANKER PAYING CROSSED CHEQUES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 830-832, paras. 1352, 1353; and FOR CASES, see DIGEST, Vol. 3, pp. 240-242, Nos. 681-692.

AS TO CHEQUES PAYABLE TO OFFICIALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 810, 811, para. 1330: and FOR CASES, see DIGEST, Vol. 3, pp. 189, 190, Nos. 386-388 and Supp.]

Cases referred to :

- (1) *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.*, [1933] A.C. 201 ; Digest Supp.
- (2) *Bissell & Co. v. Fox Brothers & Co.* (1885), 53 L.T. 193 ; 3 Digest 238, 666.
- (3) *Capital & Counties Bank, Ltd. v. Gordon, London, City, & Midland Bank, Ltd. v. Gordon*, [1903] A.C. 240 ; *revsq.*, [1902] 1 K.B. 242 ; 3 Digest 239, 670.

ACTION for damages for the wrongful conversion by the defendants of cheques belonging to the plaintiffs by reason of the negligence of the defendants.

The plaintiffs, a city livery company which had the management of a convalescent home, under the will of its founder, appointed an old employee of theirs, one Blackborow, secretary of the institution. They kept an account with the defendant bank and also opened a special account called the Rustington Home account. Blackborow, too, had an account with the defendants in his own name. There was a committee who advised on all matters to do with the management of the home. It was the practice for the cheques in payment of sums due for the expenses of the home to be signed by the master of the company and one of the wardens, of whom there were three, and countersigned by the clerk.

For some 15 years to 1935 Blackborow engaged in fraudulent practices, as a result of which sums amounting in all to about £4,217 were credited to his account and debited to the special account of the home. His procedure was to put forward invoices from alleged tradesmen for goods supplied, and, having obtained a cheque duly signed, to forge the indorsement and pay it into his account with the defendants. In some cases he forged the indorsement on a cheque payable for a genuine debt and paid it into his own account in like manner. In all cases the cheques were crossed.

The plaintiffs claimed for wrongful conversion of the cheques, or in the alternative for the proceeds of the cheques as money had and received to their use. In further alternative they claimed that the defendants as their bankers wrongfully and negligently and out of the ordinary course of business debited their account with the amounts of the cheques in question. In the defence it was pleaded (i) that the payees were non-existent persons and that Blackborow was the bearer of the cheques ; (ii) that they paid the cheques in good faith in the ordinary course of business and were protected by the Bills of Exchange Act, 1882, and the Stamp Act, 1853 ; (iii) that the cheques were crossed and payment was received for a customer without negligence. They also pleaded contributory negligence and the Statute of Limitations.

The material sections of the Bills of Exchange Act, 1882, are as follow :

60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of

the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

79. (2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or it crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

The Stamp Act, 1853, s. 19, provides as follows :

Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof ; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof.

F. P. M. Schiller, K.C., and James Wylie for the plaintiffs.

A. T. Miller, K.C., and Valentine Holmes for the defendants.

BRANSON, J. : This is an interesting case, but after some fluctuations of opinion I have arrived at a view which I shall now proceed to express.

The plaintiffs are the Master, Wardens and Commonalty of the Mystery of Freeman of the Carpentry of the City of London, and the defendants are the British Mutual Banking Co., Ltd. The plaintiffs have for many years kept an account at the defendant bank, and amongst the accounts which they have kept there was an account called the Rustington Home account, through which the plaintiffs paid the expenses of the home, which they conducted as trustees for the founder of the home. From as far back as Jan., 1920, the plaintiffs employed a man called Blackborow, first as acting clerk, and I think later on as clerk, and Blackborow was secretary of the committee which looked after the Rustington Home. From an early date, the statement of claim alleges from Jan. 23, 1920, Blackborow commenced a series of frauds by means of which, between then and Aug., 1935, he misappropriated or stole from the plaintiffs cheques which were the property of the plaintiffs, and by handing them in for collection to the defendant bank, and by getting the proceeds thereof placed to his account, he succeeded in depriving the plaintiffs of no less than £4,217 14s. 7d.

It is admitted by the plaintiffs, as indeed it had to be admitted, that those who were looking after this account were guilty of negligence. The plaintiffs alleged that, in their dealings with these cheques, the defendants were also negligent. I think that it is quite clear that the plaintiffs' negligence has nothing whatever to do with the case. I do

not think it is necessary upon that point to do more than to refer to the observations of LORD WRIGHT in the case of *Lloyds Bank, Ltd. v. Savory (E. B.) & Co.* (1) at p. 236.

The method adopted by Blackborow varied slightly from time to time. On some occasions he procured cheques which were properly signed by the master, a warden, and the clerk. On some occasions a third signature was put upon the cheque by himself as acting clerk. In all cases the cheques were properly signed by the proper officers of the company, and in most cases they were drawn to people who had supplied goods to the Rustington Home, and the cheques were drawn in order to pay invoices submitted by those people. In those cases, Blackborow would either forge an indorsement of the payee, or, in order to prevent suspicion arising in the bank, would go into the bank with someone whom he represented to be the payee, and get that person to forge the signature of the payee upon the cheque. In other cases, Blackborow forged invoices representing that somebody who had never had anything to do with the matter had supplied goods, and procured cheques to be drawn in payment of these invoices, which were, therefore, cheques drawn to people who had no existence at all, and again in those cases he would forge an indorsement to the cheque. In all the cases, having an account at the defendants' bank, he would pay the cheque in with a paying-in slip, asking the bank to credit his account with the amount of the cheque.

When the frauds were discovered, this action was brought, and the defendant bank immediately pleaded the Statute of Limitations with regard to the earlier transactions, and thereby the claim which is left is reduced to a claim of £1,955 5s. 3d. The claim is made upon the hypothesis that the defendants, by what they have done, have converted the cheques and proceeds thereof, and are liable to the plaintiffs to make good the money involved.

The defendants raise two defences. They say, first of all, that the payees of the cheques were fictitious and non-existent persons, so that they should be treated as payable to bearer, and they say also that they are bankers, and that they paid the cheques in good faith and in the ordinary course of business, and that the cheques purported to be indorsed by the persons to whom the same were drawn; and they rely upon the Bills of Exchange Act, 1882, s. 60, and the Stamp Act, 1853, s. 19, and alternatively, upon the Bills of Exchange Act, s. 82, alleging that the cheques were crossed cheques, and that they received payment of them for a customer in good faith and without negligence.

These defences raise a point of fact and at least two points of law. The point of fact is the question whether the bank acted without negligence. I think that, as a matter of fact, the bank did not act without negligence. The transactions which involve the paying in to the account

of Blackborow of cheques of which he was not the payee were transactions which not only should have excited, but did excite, the suspicions of the cashiers of the bank. Mr. Cowtan said that he noticed it and, five, ten or fifteen years ago, he called the attention of the then
 A manager to the frequency with which cheques, of which Blackborow was not the payee, were being paid in to the credit of Blackborow's account. What the manager did, we do not know, but the thing went on, and I am asked by the plaintiffs to say that that constituted negligence. The defendants suggest that some sort of explanation
 B may very well have been given to the manager which induced him to allow the practice to continue; but I do not think that I am entitled to guess at there having been some kind of explanation. In order to get the protection of sect. 82, the bank has to show that it acted in good faith and without negligence. It is a defence which they have put
 C up, and, if they cannot satisfy the onus which is put upon them by the section, they cannot get any advantage from it. Therefore the contention on sect. 82 fails altogether.

The defendants, as I have said, rely also on sect. 60 of the Act of 1882, and sect. 19 of the Act of 1853. I have been asked to hold that the
 D Stamp Act has no application to this case. It is suggested that it has been rendered inapplicable to bills of exchange by the insertion of sect. 60 into the Bills of Exchange Act, and also by the terms of sect. 24. I do not think that it is possible for me, whatever I might think of the point, to hold, as a court of first instance, that this effect has been
 E produced upon sect. 19 of the Act of 1853 by anything which is contained in the Bills of Exchange Act. Sect. 19 was applied to a case of cheques in the case of *Bissell & Co. v. Fox Brothers & Co.* (2), and it was also dealt with and commented upon by LORD LINDLEY in the House of Lords in the case of *Capital & Counties Bank, Ltd. v. Gordon* (3). Both
 F the Court of Appeal and the House of Lords have treated sect. 19 as still in force and operative. The Court of Appeal has in fact applied it to a case of a cheque, and the House of Lords has not said that it did not apply to the case of a cheque. In those circumstances, I hold that sect. 19 is operative, and that the defendants, if they can bring themselves within
 G it, can take advantage of it.

With regard to sect. 60, it is pressed upon me that sect. 60 should be construed as at all events limiting sect. 19, because sect. 60 speaks of the bill being paid in good faith and in the ordinary course of business, whereas sect. 19 does not use any such limiting words. For the purpose
 H of my present decision, I do not think that the difference is material. I think it is fair to say that when LORD LINDLEY was dealing with the matter in *Gordon's* case (3), at p. 252, he did not seem to think that there was any real distinction to be drawn, but this, at all events, seems quite clear, that whatever limitation the use of the words "in the

ordinary course of business " puts upon the protection given by sect. 60 to the bank, those words cannot be construed as meaning the same as the different words used in sect. 82. Sect. 82 speaks of " in good faith and without negligence." I think that where the same Act uses such different language it would be improper to say that when negligence is proved, A then, because negligence is not in the ordinary course of business, the transaction was not carried through in the ordinary course of business. In the present case the payment which was made was payment, so far as the bank could see, according to the tenor of the draft. The drafts were properly drawn, they were indorsed apparently properly so as to be B properly payable to the bearer, and they were credited to the bearer who handed them in to be credited to his account. There was nothing in any of those steps which was not in the ordinary course of business. So that, in my opinion, subject to what may or may not be the effect of the cheques having been crossed, this case is indistinguishable from C the case of *Bissell & Co. v. Fox Brothers & Co.* (2), which I have already cited, and notwithstanding that in my opinion the bank was negligent, as the bank in *Bissell & Co. v. Fox Brothers & Co.* (2) was held to be, the bank is entitled to the protection of sect. 19, as the bank in that case was held to be. D

With regard to the effect of the crossing, the cheque in *Bissell & Co. v. Fox Brothers & Co.* (2) was not a crossed cheque ; the cheques in this case are crossed cheques ; and it was urged, and with force, that even supposing that the bank was entitled to protection under sect. 19 of the Act of 1853, or under sect. 60 of the Act of 1882, as I think the defendants E are apart from this point, the effect of the cheques being crossed causes them to become liable, under the provisions of sect. 79 (2) of the Act of 1882 ; for it is said that these were crossed cheques, and if you cannot divide the bank into two capacities so as to make them both the paying bank and the receiving bank, they have paid these cheques F contrary to the instructions put upon them by crossing, and therefore they are people who have paid a crossed cheque otherwise than to a bank.

The answer to that contention is, I think, to be found in the case of *London, City & Midland Bank, Ltd. v. Gordon* (3). That case dealt with G a number of different sorts of transactions, and the cheques involved in it were divided into classes. Class 4 of those classes consisted of cheques which were dealt with in precisely the way in which the cheques involved in the present case were dealt with, with only this difference, that in *Gordon's* case (3) there were different branches of the same bank concerned in the dealing with some, at all events, of the cheques involved. H In this case, the defendants have no branch, and all that happened took place at their one and only office. In so far as it makes any difference at all, it seems to me to help the defendants rather than the plaintiffs.

In dealing with class 4, SIR RICHARD HENN COLLINS, M.R., put the matter in this way. He said, at p. 274 :

A The cheques in question are crossed cheques drawn on one branch of the defendants' bank and handed to another branch for collection. Entries were made in the books of one branch in favour of the customer who presented the cheques for collection, and entries were made in the books of the other branch, whereby it was debited and the first-mentioned branch was credited with the amounts of the cheques. The transactions were between different branches of the same bank ; but in the result the effect was that one branch of the bank by means of that process paid these crossed cheques.

B Then :

It is argued that, the cheques being crossed cheques, the transaction is unprotected by reason of the provisions of sect. 79 of the Act—

and that he quotes. Then he continues :

C On the other hand, it is clear that, but for the terms of sect. 79, and the cheques being crossed, the defendants would be protected in respect of these cheques by sect. 60 ; and it would, I think, be a curious and anomalous result, if the bank were in a case like this deprived of that protection by the legislation with regard to crossed cheques, the object of which was to make such cheques only payable through bankers, and became liable for paying these cheques which, apart from that legislation, they could safely have done under sect. 60.

D When once I hold, as I have held, that these cheques were paid in the ordinary course of business, every word of that applies exactly to the facts of the present case. Then SIR RICHARD HENN COLLINS, M.R., goes on to deal with the position under sect. 79, and he does so by saying, at p. 275 :

E It seems to me that the difficulty may fairly be met by giving a reasonable construction to the words of sect. 79. The defendants, whose branch bank receives payment from another branch, are certainly a bank. It may be that the payment is to themselves : still it is a payment made to a bank, and the payment is also by a bank. That being so, I think that without too much straining of the words of the section the case may be brought within it. I think that the case for the defendants may be put alternatively in this way. Either the case is outside the legislation as to crossed cheques, which does not apply to a case where the circumstances do not admit of two banks being involved in the transaction, and so the defendants are within sect. 60 ; or, if the case is within sect. 79, the payment by one branch of the bank to the other satisfies the requirements of that section.

G I find it impossible to distinguish the facts of this case from the facts with which the Court of Appeal was dealing in *Gordon's* case (3), and what SIR RICHARD HENN COLLINS, M.R., said applies to this case equally as it applied to the facts in that case.

I think the matter is made even more clear by STIRLING, L.J., when he is dealing with the same class 4. He puts it in this way, at p. 281 :

H Either sects. 79 and 80 give the required protection to the bankers, because the payment in such a case as this is made to a banker within the meaning of those sections ; or, if those sections are not applicable, then there is nothing to take the case out of the provisions of sect. 60. The mode in which the cheques were dealt with in this case, namely, by carrying the amount of the cheque to the credit of the customer paying in the cheque, was in *Bissell & Co. v. Fox Brothers & Co.* (2) treated by the Court of Appeal as a good payment within sect. 60. In these circumstances I think that the defendants are entitled to the protection of sect. 60 in respect of class 4.

From that it appears that STIRLING, L.J., read the case of *Bissell & Co. v. Fox Brothers & Co.* (2) as a case which came within the protection of sect. 60, and *Bissell & Co. v. Fox Brothers & Co.* (2) was a case in which negligence had been found against the bank in question there. That seems to me to support the view that I have already expressed, that negligence does not prevent the payment being made in the ordinary course of business. A

The authority of those two cases, both cases in the Court of Appeal, seems to me to be conclusive of the decision in this case. I think that, before parting with them, I should quote one more passage from the judgment of STIRLING, L.J. On p. 281, a little before the last quotation, he refers to sects. 79 and 80 of the Act of 1882, and says : B

But, when those sections are looked at, they appear to me to contemplate the case of a crossed cheque which is drawn on one banker being handed to another banker for collection. C

So STIRLING, L.J., takes the view that sect. 79, which is speaking of paying a crossed cheque otherwise than to a banker, contemplates only a case where that is done, and therefore the section does not apply to a case where only one bank is involved in the transaction. With that view, if it is for me to express an opinion, I respectfully agree. It seems to me that the other one involves, as SIR RICHARD HENN COLLINS, M.R., put it, not too great straining of the words ; but it is preferable, it seems to me, to adopt a construction, as STERLING, L.J. did, which does not strain the words at all. D

For these reasons, I have come to the conclusion that the defendants are entitled to the protection conferred by sect. 60 of the Act of 1882, and, if there is any difference in it, to that conferred by sect. 19 of the Act of 1853, and therefore that this action should be dismissed. E

Solicitors : *Sir John J. Stavridi* (for the plaintiffs) ; *White & Leonard & Nicholls & Co.* (for the defendants). F

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

"THE ROCKABILL."

**"KING ORRY" (OWNERS) v. "ROCKABILL" (OWNERS)
AND MERSEY DOCKS AND HARBOUR BOARD.
"ROCKABILL" (OWNERS) v. MERSEY DOCKS AND
HARBOUR BOARD.**

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J., with two assessors),
December 8, 9, 10, 11, 14, 15, 1936.]

*Shipping—Collision—Ship leaving dock—Order of dock master—Liability of
dock authority—Maritime Conventions Act, 1911 (c. 57), s. 1.*

In the court of first instance, it was held by BUCKNILL, J., that the "Rockabill" was solely to blame for the collision, but the Court of Appeal have found that both vessels were to blame. The liability of the Mersey Docks and Harbour Board therefore did not arise, but the following propositions received the support of the Court of Appeal:—

(i) (GREER, L.J., dissenting): The order "Come ahead" given by the dock master to the "Rockabill" was a statutory direction within the Mersey Dock Acts Consolidation Act, 1858, s. 49, and one which the master of the "Rockabill" was bound to obey.

(ii) (SLESSOR, L.J., dissenting): The duty of the Mersey Docks and Harbour Board ceased when the bow rope was cast off.

(iii) the Maritime Conventions Act, 1911, does not alter the common law rule of contributory negligence as between the Dock Board and both plaintiffs.

[EDITORIAL NOTE. This appeal is reported only so far as the Lords Justices touch upon the case as reported in the court of first instance. The appeal being decided upon a question of fact, these points do not really arise; but their remarks are reported so that they may be considered with the earlier judgment.]

Cases referred to:

- (1) *The Bilbao* (1860), Lush. 149; 41 Digest 972, 8632.
- (2) *Reney v. Kirkcudbright Magistrates*, [1892] A.C. 264; 41 Digest 978, 8670.
- (3) *Taylor v. Burger* (1898), 78 L.T. 93; 41 Digest 971, 8620.
- (4) *The Sunlight*, [1904] P. 100; 41 Digest 971, 8624.
- (5) *The Cynthia* (1876), 2 P.D. 52; 41 Digest 787, 6478.
- (6) *The Excelsior* (1868), L.R. 2 A. & E. 268; 41 Digest 705, 5404.
- (7) *H.M.S. Archer*, [1919] P. 1; 41 Digest 796, 6553.
- (8) *The Koursk*, [1924] P. 140; 41 Digest 798, 6591.
- (9) *The Hjortholm* (1935), 53 Lloyd L.R. 278.

APPEAL and cross-appeal from a decision of BUCKNILL, J., dated May 26, 1936. The facts and the judgment in the court below are set out in [1936] 2 All E.R. 808.

R. K. Chappell, K.C., and E. W. Brightman for the appellants, the Mersey Docks and Harbour Board.

Lewis Noad, K.C., and Robert E. Gething for the cross-appellants, the owners of the "Rockabill."

F. A. Sellers, K.C., and H. I. Nelson for the respondents.

Chappell, K.C.: There is no negligence of the Dock Board in law. The Board owed no duty to the "King Orry," breach of which could be actionable. The Board gave no orders to the "Rockabill" to go out of

the dock into the river, but only permission so to do. In *The Sunlight* (4) there was a collision in similar circumstances in about the same place. In that case it was never suggested by the plaintiffs that the Dock Board was under any duty to them. The "Rockabill" was not relieved from the duty of keeping a good lookout. A

Noad, K.C. : The "Rockabill" was under the directions or orders of the Dock Board ; she had to obey them ; there is a statutory penalty for their breach. She was entitled to rely on the Dock Board.

Gething, following on the same side : If there was blame on anyone except the "King Orry," it was on the Dock Board. The "Rockabill" B was quite helpless once the directions had been given. She had to obey.

Sellers, K.C. : Both the "Rockabill" and the Dock Board owed a duty to the "King Orry." There are three types of cases ; the order of a dock authority may be of such a character that it must be obeyed—then the ship is released from any consequences ; an order may be C negligently carried out, or there may be a *novus actus interveniens*—then the Dock Board will not be liable ; but where, as in this case, there is co-operation between the two, then both are liable : *The Bilbao* (1) ; *Taylor v. Burger* (3). In *Reney v. Kirkcudbright Magistrates* (2) the words "come on" were held to be a direction which must be obeyed. But the D orders of a harbourmaster must be executed with care, and not recklessly : *The Cynthia* (5). Here, the "Rockabill" had only to look before starting and she would have seen the "King Orry." A collision was inevitable if she went out of the dock at full speed, but not if she went down slowly with check ropes. If both the "Rockabill" and the Dock E Board were negligent, both are to blame, unless it can be shown that a later negligence caused the collision. The Dock Board cannot escape liability under the common law rule, as in this case the Marine Conventions Act, 1911, applies. Sect. 9 (4) applies to any person other than the owners who are responsible ; if the master had no option but to F obey, then the Dock Board was in control and the Act applies. [Counsel referred to *The Excelsior* (6) ; *H.M.S. Archer* (7) ; *The Koursk* (8) ; and *The Hjortholm* (9).]

Chappell, K.C., in reply : The intimation was neither intended nor taken as a direction having statutory force. The significance was limited G by the addition of the phrase "All clear North." It was only a permission, not a peremptory order. It did not excuse the "Rockabill" from keeping a good lookout.

GREER, L.J. : With reference to the conduct of the Dock Board H officials my own view is that there was no negligence on their part at all, but that is a matter of comparative unimportance, having regard to the fact that, if there was contributory negligence on the part of the two vessels, that would relieve the Dock Board of the consequences

of negligence. The reason why I say, in my judgment, that I think there was no negligence is this : the officials of the Dock Board could only see to the north at the time when the order was given to the defendants' vessel to come on, and, having regard to the conversation which the
A learned judge found had taken place between the master of the defendants' vessel and the dockmaster, the order was what I call a conditional order, viz., that they should come ahead, keep a proper lookout at the same time, and if there was any danger towards the south and the west they should take such measures as would be necessary to save the
B situation. But, as they failed to do that, the responsibility is upon them, and not upon the Dock Board when, as I have said, it is quite immaterial for the purposes of this case whether the Dock Board officials were or were not to blame, because if both vessels were also to blame then, at common law, there is a complete defence for the Dock Board.

C
SLESSER, L.J. : I am of the same opinion. I do not find it necessary to add anything to what my Lord has said about the liability of the " King Orry," but I do feel it right to say that I have come to certain conclusions which lead to the same results as those stated by my Lord
D with regard to the " Rockabill," but proceed upon a slightly different line. In my view the finding of the learned judge that Bingham said " come ahead " to the " Rockabill's " master did constitute a direction to him to come ahead within the meaning of the Mersey Dock Acts Consolidation Act, 1858, s. 49, which provides that any harbour master,
E dockmaster, or pier master may direct the time and manner of any vessels coming into or going out of any dock, more particularly when it is found that that direction to come ahead was accompanied by an order that the bow rope should be cast away. Now, it is true that the evidence goes to show that the master of the " Rockabill " had said " All clear
F north," but it must be remembered that his case was that he only said " All clear north " and did not say " come ahead with her ". On this the learned judge has found in favour of the story of the master of the " Rockabill," that Captain Bingham did use that phrase. Having used that phrase, coupled with the order to cast off the rope—even
G after he had been asked by one or two of the seamen whether he really meant that the rope should be cast off entirely and had said yes—that constitutes in my mind a direction. I do not quite understand the distinction which the learned judge makes in his judgment between an order which he calls peremptory, and an order not peremptory. I think
H that this is a clear direction within the meaning of the regulation which, in accordance with the decision in *The Bilbao* (1), the master was under compulsion of statute to obey. Had the matter remained there, I should have found it very difficult to see how the " Rockabill " could have been held responsible for coming ahead as they were directed. The authority

of *Reney v. Kirkcudbright Magistrates* (2) makes it quite clear to my mind that, when a direction is given, it is not for the master to whom the direction is given to criticise or consider it. It is his business to obey. The same is clear in the later case of *Taylor v. Burger* (3)—the case of *The Talisman*—where the EARL OF HALSBURY, L.C., said, at p. 94 :

I adhere to what I said in the case of *Reney v. Kirkcudbright Magistrates* (2), that if it were once supposed that a person acting under the orders of a harbour master is to exercise his own judgment whether or not the harbour master's orders are most consistent with prudence, and then refuse to obey the order given, that would lead to very serious consequences indeed.

But we have to consider what was the order given. The order given was to come ahead, and between the time the order was given and the time when the stem of the boat was emerging into the open river (when the effects of wind and tide would have made it impossible for the vessel to have arrested its course)—in the interval it was practical, had a proper lookout been kept, to have put the engines astern and cast off the rope, there being a man walking along, as the evidence shows, ready to act upon that manœuvre. It is, therefore, as far as I am concerned, not because I think that the order originally given was not a direction which would have to be obeyed, but because after that order had been given there remained the duty to keep a good lookout, and the failure to keep that good lookout resulted in an accident which might have been avoided. During that short interval of time when the vessel was passing along the remainder of the channel we are advised by our assessors, and I agree, that the failure during that minute (and it cannot have been very much more) to keep a proper lookout amounted to some negligence on the part of the "Rockabill." It is because I think that that negligence was comparatively slight that I agree in the proportions of blame which are suggested in this case, fixing the greater liability upon the "King Orry" who, as my Lord says, showed a complete negligence in the matter. It only remains to say that, having come to the conclusion that both vessels were negligent, the question of the liability of the Mersey Docks and Harbour Board does not arise at common law. Putting it that way as an economy of statement, I do not propose to discuss matters which, in the result, have proved to be irrelevant. But, in so far as I agree with the opinion indicated on the matter, I would say that, speaking for myself, I am not satisfied that, had the matter been closely investigated, the Harbour Board would necessarily have been acquitted of all liability for negligence. That is my personal opinion but, as I say, it is not necessary in the circumstances to say more, and I have to agree in the judgment which has been given by my Lord.

SCOTT, L.J. : I only want to say one word about the "Rockabill." The view I take is that in regard to her starting to go out through the

- entrance she is completely protected by what I regard as a definite direction from the Dock Board. I follow the principle indicated by the EARL OF HALSBURY, L.C., in the case of *Taylor v. Burger* (3), where he says you must not trouble about the particular words used ; you have got to form an opinion as to what the real intention and understanding of the order was.
- A I have not the faintest doubt that in this case the dockmaster gave a definite order to this vessel to go out, and that that protected the owners of the vessel from any liability for starting out, but it did not protect them, in my view, from failing—as I think they did fail—to have a good lookout on their vessel from the moment that they did start out pursuant to the order. The Dock Board's duty to the vessel ceased when the bow rope was cast off, except and in so far as it was necessary to have somebody available to take a rope from the vessel should she want to throw a line ashore before she left the entrance.
- B
- C The Dock Board gets off. I will say why I do not think the Dock Board was negligent, although it makes no difference in the result. I think that at the moment when the dockmaster looking before him gave the order to cast off, the " King Orry " had not moved from the landing stage. It is quite possible that her bow rope had been cast off,
- D but I see no reason to think she had moved. And, if she had not moved, there was nothing he could see, and *a fortiori* there was nothing at an earlier point of time that Stafford could have seen in the way of movement of the " King Orry." That is the only negligence imputable to the Dock Board. But, assuming that it was guilty of negligence
- E as found by the learned judge, then I, of course, agree that under the Maritime Conventions Act there is nothing to alter the old common law position of the freedom from liability of the defendant where the accident is contributed to by the negligence of the plaintiff, and I think that as regards both plaintiffs here it is right to treat the accident as contributed
- F to by all three parties if the Dock Board were negligent.

For these reasons I agree with the result of the judgments.

- Solicitors : *E. P. Moorhouse* (for the appellants) ; *Pritchard, Sons, Partington & Holland*, agents for *Batesons & Co.*, Liverpool (for the respondents) ; *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the first defendants in the cross-appeal).
- G

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

**SOCKALINGAM CHETTIAR AND ANOTHER v.
RAMANAYAKE AND ANOTHER.**

[PRIVY COUNCIL (Lord Maugham, Lord Salvesen, Sir Lancelot Sander-
son), **October 19, 20, 22, November 19, 1936.**]

Privy Council—Ceylon—Moneylending—Mortgage—Security for payment of advances made upon promissory notes—Promissory notes not in prescribed form and therefore unenforceable—Admissibility in evidence to prove the loans—Jurisdiction of court to re-open the transaction—Ceylon Money-lending Ordinance (No. 2 of 1918), ss. 2, 8, 10, 13, 14.

The appellants, moneylenders in Ceylon, brought an action on a mortgage bond to recover from the first respondent the sum of Rs.129,415/87, alleged to be due to them for money lent on the mortgage bond and on promissory notes. The respondent pleaded, *inter alia*, that the notes did not comply with the provisions of the Moneylending Ordinance (No. 2 of 1918), because the amounts deducted as interest did not appear in the margin of the notes which were therefore unenforceable. The appellants before the Judicial Committee admitted this contention, but in answer contended that the loans themselves were legal and could be recovered by the lenders, and that the notes were admissible in evidence to show the amounts due.

By sect. 2 of the Ordinance the court had power to re-open money-lending transactions on the ground of excessive interest, undue influence, or by reason of the fact that the lender took a promissory note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious or the amount due was left blank. By sect. 8 a moneylender was required to keep an account of every loan, stating in plain words and figures the items and transactions incidental to the account, and entered in a book so paged and bound as to prevent interpolation or substitution of new pages. In default of compliance with this section, the loan was to be unenforceable. By sect. 10 every promissory note must contain particulars of the capital sum actually borrowed, the amount of any sum deducted or paid as interest, premium, or charges, the rate per cent. per annum of the interest, and, in default, the note was to be unenforceable. By sect. 13 the taking as security of any note in which the amount stated was fictitious or left blank was made an offence punishable by fine, and, in the case of a second offence, by imprisonment. By sect. 14 a promissory note in which the particulars were not properly stated in accordance with these provisions or any note where the true amount lent was disguised was to be deemed a note in which the amount was fictitious:—

HELD: (i) although the promissory notes were notes in which the amounts stated as due were to the knowledge of the lender fictitious within the meaning of sect. 14 of the Ordinance, and unenforceable by reason of the provisions of sect. 10, the court had jurisdiction under sect. 2 of the Ordinance to reopen the transaction and to take an account of the amounts due.

(ii) the promissory notes which were not enforceable by reason of sect. 10, and were by implication from sect. 13 prohibited, were not admissible in evidence to prove the loans.

[EDITORIAL NOTE.] The terms of the Ceylon Ordinance differ considerably from those of the English Moneylending Act, 1927, but in the application of the general principles of law to the position of moneylending transactions arising from their unenforceability or their illegality, the judgment herein seems likely to be of general interest.

AS TO REOPENING MONEYLENDING TRANSACTIONS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 201-206, paras. 305-310; and FOR CASES, see DIGEST, Vol. 35, pp. 212-218, Nos. 375-452.

AS TO NEGOTIABLE INSTRUMENTS AS EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 2, p. 735, para. 1037; and FOR CASES, see DIGEST, Vol. 6, pp. 486-489, Nos. 3092-3110.]

Cases referred to :

(1) *Master v. Miller* (1793), 2 Hy. Bl. 141; 6 Digest 372, 2450.

(2) *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K.B. 1080; 1 Digest 42, 335.

(3) *Palaniappa v. Saminathan* (1913), 17 N.L.R. 56.

(4) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; Digest Supp.

(5) *Scott v. Brown, Doering McNab & Co., Slaughter & May v. Brown, Doering McNab & Co.*, [1892] 2 Q.B. 724; 1 Digest 41, 326.

(6) *Ramen Chetty v. Renganathan Pillai* (1927), 28 N.L.R. 339.

(7) *Fernando v. Fernando* (1934), 36 N.L.R. 77.

(8) *Wickremesuriya v. Silva* (1935), 37 N.L.R. 274.

APPEAL from two decrees of the Supreme Court of the Island of Ceylon (DALTON, Acting C.J., KOCH, Acting J.), dated Aug. 1, 1933, setting aside an order and also a decree of the District Court of Colombo (FERNANDO, D.J.), dated Dec. 9 and 21, 1932, respectively. The facts of the case appear in the judgment of their Lordships delivered by SIR LANCELOT SANDERSON.

R. M. Montgomery, K.C., H. I. P. Hallett, K.C., and L. M. D. de Silva, for the appellants, referred to : *Master v. Miller* (1), *Gordon v. Metropolitan Police Chief Comr.* (2), *Palaniappa v. Saminathan* (3).

J. Chinna Durai and Lady Chatterjee, for the respondents, referred to : *Anderson, Ltd. v. Daniel* (4), *Scott v. Brown, Doering McNab & Co.* (5), *Gordon v. Metropolitan Police Chief Comr.* (2), *Ramen Chetty v. Renganathan Pillai* (6), *Fernando v. Fernando* (7), *Wickremesuriya v. Silva* (8).

SIR LANCELOT SANDERSON : This is an appeal by the plaintiffs against two decrees of the Supreme Court of the Island of Ceylon, dated Aug. 1, 1933, whereby the Supreme Court set aside an order and a decree of the District Court of Colombo, dated Dec. 9 and 21, 1932, respectively, and dismissed the action with costs. The respondents are the first and second defendants in the action.

The material facts are as follows : By a mortgage bond dated July 28, 1928, the first defendant (Ramanayake) covenanted with the first plaintiff (Sockalingam) and one Ramasamy to pay any sum of money which might thereafter be or become owing and payable to the first plaintiff or the said Ramasamy or either of them upon or in respect of any promissory notes or cheques made or indorsed by the first defendant or upon chits, tundus or other writings or in respect of any loans or advances or in respect of any accounts or transactions whatsoever

with interest at the rate of 12 per cent. per annum. The bond further secured all such sums by the mortgage of certain properties therein specified. On Apr. 1, 1931, the said Ramasamy assigned all his rights under the said mortgage bond to the second plaintiff, and the action in which this appeal arises was brought on the same day. The plaintiffs A thereby sought to recover the sum of Rs.129,415/87 alleged to be due in respect of money lent on the security of the said bond and upon certain promissory notes; they prayed further for the usual mortgage decree for sale of the mortgaged property in default of payment of the said sum. B

The second defendant was made a party to the action as a puisne encumbrancer of the mortgaged property.

Certain pleas were made and issues raised to which it is not now necessary to refer, and the questions which arise in this appeal relate to the issues numbered 8 and 9 in the judgment of the district judge. C They are as follows :

8. Are the promissory notes mentioned in para. (6) of the plaint or any notes of which they are renewals not enforceable by reason of the failure to give details required by Ordinance 2 of 1918, s. 10 ?

9. In view of the several allegations in the plaint, is the second defendant entitled to ask that the transactions between the first defendant and the plaintiffs or either of them be re-opened and an account taken ? D

The district judge decided that the promissory notes in question were themselves not enforceable, but at the same time he held that they were admissible in evidence to prove the amount due on the mortgage bond. On the ninth issue he held that the second defendant was entitled to E ask that the transactions between the plaintiffs and the first defendant should be re-opened.

Accordingly, on Dec. 9, 1932, he directed the plaintiffs to file in court a statement showing the moneys actually lent by the first plaintiff and Ramasamy to the first defendant from time to time on promissory F notes, the amount of interest actually deducted in advance, the interest which they were entitled to deduct if calculated at 12 per cent. for the period when each note fell due and the amounts paid by the first defendant with the date of each payment. Accounts were filed by the plaintiffs in accordance with the said order, and on Dec. 21, 1932, the district G judge, after investigating the accounts and hearing evidence, held that a sum of Rs.10,518/13 had been overcharged by the first plaintiff, and that a sum of Rs.7,378/96 had been overcharged by the second plaintiff. He therefore made a decree that the first defendant should pay to the plaintiffs jointly the sum of Rs.111,518/78 with interest thereon at H 12 per cent. per annum from Apr. 1, 1931, to date of decree, and thereafter on the aggregate amount of the decree at 9 per cent. per annum till payment in full and costs of suit forthwith. He further made the usual mortgage decree in respect of the said sums.

The first and second defendants appealed to the Supreme Court by two petitions. The first was against the order of the district judge of Dec. 9, 1932, and the second against the decree of the said judge dated Dec. 21, 1932. The Supreme Court held that, as the plaintiffs
 A were moneylenders, the provisions of the ordinance relating to money-lending—viz., No. 2 of 1918—applied to the transactions, that the promissory notes failed to comply with the provisions of sect. 10 of the ordinance because some of them did not show the amount of money deducted as interest paid in advance and because others which were
 B renewal notes failed to show the capital sum actually borrowed; and that under subsect. (2) of the said section the promissory notes were not enforceable. The court held that though the bond was not in itself illegal, the promissory notes were illegal, and that the court would refuse to enforce the security for those illegal transactions, the bond,
 C so far as it secured the illegal transactions, being tainted with the same illegality. Accordingly, on Aug. 1, 1933, by the two decrees of that date the Supreme Court allowed both appeals, set aside the order and decree of the district judge, dismissed the plaintiffs' action, and directed that the plaintiffs should pay the taxed costs of the first and second
 D defendants. It is against the above-mentioned decrees that the plaintiffs have appealed to His Majesty in Council.

The material sections of the ordinance are as follows :

2. (1) Where proceedings are taken in any court for the recovery of any money lent after the commencement of this ordinance, or the enforcement of any agreement or security made or taken after the commencement of this ordinance in respect of money lent either before or after the commencement of this ordinance, and there is evidence which satisfies the court—
 E

(a) That the return to be received by the creditor over and above what was actually lent (whether the same is charged or sought to be recovered specifically by way of interest, or in respect of expenses, inquiries, fines, bonuses, premia, renewals, charges, or otherwise), having regard to any sums already paid on account, is excessive, and that the transaction was harsh and unconscionable,
 F or, as between the parties thereto, substantially unfair; or

(b) That the transaction was induced by undue influence, or is otherwise such that according to any recognised principle of law or equity the court would give relief; or

(c) That the lender took as security for the loan a promissory note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious, or the amount due was left blank—
 G

the court may re-open the transaction and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid or allowed in account by the debtor, may order
 H the creditor to refund it; and may set aside, either wholly or in part, or revise, or alter any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under the last preceding sub-

section, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this ordinance by the borrower or surety or other person liable, notwithstanding that the time for repayment of the loan or any instalment thereof may not have arrived.

(3) In any insolvency proceedings on any application relating to the admission or amount of a proof in respect of any money lent, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money. A

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of moneylending.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

8. (1) A person who carries on the business of moneylending, or who advertises or announces himself or holds himself out in any way as carrying on that business, shall keep or cause to be kept a regular account of each loan, clearly stating in plain words and numerals the items and transactions incidental to the account, and entered in a book paged and bound in such a manner as not to facilitate the elimination of pages or the interpolation or substitution of new pages. B

(2) If any person, subject to the obligations of this section, fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made.

Provided that in any case in which the court is satisfied—

(a) That the default was due to inadvertence and not to any intention to evade the provisions of this section; and C

(b) That the receipt of the loan, the amount thereof, the amount of the payments on account, and the other material transactions relating thereto satisfactorily appear by other evidence—
the court may give relief against any such default on such terms as it may deem just.

10. (1) In every promissory note given as security for the loan of money after the commencement of this ordinance, there shall be separately and distinctly set forth upon the document— D

(a) The capital sum actually borrowed;

(b) The amount of any sum deducted or paid at or about the time of the loan as interest, premium, or charges paid in advance; and

(c) The rate of interest per cent. per annum payable in respect of such loan.

(2) Any promissory note not complying with the provisions of this section shall not be enforceable. E

Provided that in any case in which the court shall be satisfied that the default was due to inadvertence and not to any intention to evade the provisions of this section, it may give relief against the effect of this subsection on such terms as it may deem just.

(3) The setting forth of the particulars required by subsect. (1) shall not affect the negotiability of any promissory note.

(4) Any promissory note setting forth the said particulars substantially in the form given in the schedule to this ordinance shall be deemed to be in compliance with this section. F

(5) The provisions of this section shall apply to renewals of any loan, and in all such cases the amount stated as the capital sum actually borrowed shall be the amount of the original loan.

13. Any person who shall take as security for any loan a promissory note or other obligation in which the amount stated as due is to the knowledge of the lender fictitious, or in which the amount due is left blank, shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding 500 rupees, or in the event of a second or subsequent offence, either to a fine not exceeding 1,000 rupees, or to simple imprisonment for a period not exceeding 6 months. G

14. A promissory note given in respect of a loan with regard to which a deduction was made or a sum paid at or about the time of the loan in respect of interest, premium, or charges payable in advance, without such deduction or payment being set forth upon the document in accordance with sect. 10 (unless the circumstances are such as reasonably to entitle the lender to relief under that section), and any promissory note or other obligation in respect of a loan, with regard to which at or about the time of the loan any payment was made, or any collateral transaction entered into with a view to disguising the actual amount of the sum advanced, or the rate of interest payable in respect thereof, shall be deemed to be a promissory H

note or obligation in which the amount stated as due is, to the knowledge of the lender, fictitious within the meaning of sects. 2 and 13 of this ordinance.

Particulars required by "The Money Lending Ordinance, No. 2 of 1918."

1. Capital sum borrowed, Rs. _____.
2. Interest, premium, or charges deducted or paid in advance, if any, Rs. _____.
3. Rate of interest per centum per annum. _____.

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SCHEDULE.

Promissory note given in respect of a loan.

On demand (or _____ months after date) I promise to pay to _____, or order, the sum of rupees _____, with interest thereon at the rate of _____ per cent. per annum. *Stamp.*

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(Signature of borrower.)

At the hearing of the appeal before their Lordships, it was admitted by learned counsel for the plaintiffs that the promissory notes did not comply with the provisions of sect. 10 inasmuch as they did not state the interest premium or charges deducted or paid in advance, and consequently that the promissory notes were not enforceable. Further, it was admitted that the default was not due to inadvertence and that the promissory notes must be taken to be fictitious within the meaning of the ordinance to the knowledge of the lenders. It was, however, contended that the district judge had jurisdiction to re-open the transactions under sect. 2 of the ordinance and to take an account between the lenders, viz., the plaintiffs and the person sued, viz., the first defendant, and relieve the first defendant from payment of any sum in excess of the sum adjudged by the district judge to be fairly due in respect of principal, interest and charges as the district judge might adjudge to be reasonable.

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On the other hand, it was contended on behalf of the defendants that inasmuch as the promissory notes were taken as security for the loans and were not only unenforceable by reason of sect. 10 of the ordinance but were, by necessary implication from sect. 13, prohibited, the plaintiffs were not entitled to recover the loans, or any part thereof. In considering the above-mentioned contentions, the first thing to be observed is that in the ordinance the loan is treated as being something different from the promissory note, which is therein described as a security. The provisions of sect. 10 make that clear. The section begins with the sentence, "In every promissory note given as security for the loan of money." This must be remembered in construing the material words of sect. 10 (2), viz. :

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any promissory note not complying with the provisions of this section shall not be enforceable,

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that is to say, the security, consisting of the promissory note, for the loan is not to be enforceable. The subsection does not provide that the loan shall be irrecoverable. If that had been intended, it could easily have been so provided. It is to be noted that the above-mentioned

provision is very different from the words of sect. 8 (2), which provides that :

If any person subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of such transaction in relation to which the default shall have been made.

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The difference between the provisions of the two above-mentioned sections is striking, and it is abundantly clear that when it was intended to prevent any claim in respect of a transaction being enforced, it was stated in clear and unmistakable language.

In their Lordships' opinion, sect. 2 affords evidence that the provisions of sect. 10 were not intended to make the loan therein referred to irrecoverable ; for that section provides that where proceedings are taken in any court for the recovery of any money lent or the enforcement of any security made or taken after the commencement of the ordinance in respect of any money lent, the court may re-open the transaction in certain events. One of the events is if the court is satisfied that the lender took as security for the loan a promissory note in which the amount stated as due was to the knowledge of the lender fictitious or the amount due left blank. To ascertain what is meant by the phrase in this section, a promissory note in which the amount stated as due was to the knowledge of the lender fictitious,

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reference must be made to sect. 14, which provides that a promissory note given in respect of a loan with regard to which a deduction was made or a sum paid at the time of the loan in respect of interest, premium or charges payable in advance without such deduction or payment being set forth upon the document in accordance with sect. 10 (subject to the proviso therein stated) is to be deemed to be a promissory note in which the amount stated as due is to the knowledge of the lender fictitious within the meaning of sects. 2 and 13 of the ordinance. It follows, therefore, that although the promissory notes in this case were notes in which the amounts stated as due were to the knowledge of the lender fictitious within the meaning of sect. 14, and could not be enforced by reason of the provisions of sect. 10, the court had jurisdiction under sect. 2 of the ordinance to re-open the transaction and to take an account between the plaintiffs and the first defendant.

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It was argued on behalf of the defendants that sect. 2 applies only to cases where action is taken by the borrower or by a third person to whom the security in question has passed by way of assignment, and that otherwise sect. 2 would be inconsistent with the provisions of sect. 10. Their Lordships are unable to accept that contention. The provisions of the section are clear and unqualified, and there is no justification for putting a construction upon the section which confines the jurisdiction of the court to the cases suggested in the argument. Further, it appears to their Lordships that there is no inconsistency between sect. 2 and

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sect. 10. Sect. 10 provides that if the court is satisfied that the default was due to inadvertence, and not to any intention to evade the provisions of the section, the court may give relief on such terms as it may deem just. That provision is directed to a state of things quite different
 A from that contemplated in sect. 2, which provides for a case where the lender has taken as security for the loan a promissory note in which the amount stated as due was *to the knowledge* of the lender fictitious.

In such a case jurisdiction is given to the court to re-open the transaction and to take an account of what is actually due to the lender. Stress
 B was laid by learned counsel for the defendants upon the provisions of sect. 13, and it was argued that inasmuch as the ordinance provided a penalty for taking a "fictitious" promissory note as security for a loan, it must have been intended that the loan could not be recovered. There is no doubt that this section and other sections of the ordinance
 C were intended for the protection of members of the public who might be borrowers from moneylenders, and it is quite intelligible that it was considered of great importance that a promissory note taken by a moneylender as security for a loan should bear on the face of it the particulars specified in sect. 10, and that with a view to enforce such
 D protection a penalty was imposed on the moneylender in the event of his non-compliance with the provisions thereof. It does not necessarily follow that it was intended that the loan in respect of which such "fictitious" promissory notes were taken should be irrecoverable, and, when the other sections of the ordinance are taken into consideration,
 E and in the absence of any specific provision such as is found in sect. 8 (2) to the effect that the moneylender should not be entitled to enforce his claim, their Lordships are of opinion that the provisions of sect. 13 do not prevent the court from re-opening the transaction and taking the account under the provisions of sect. 2.

Their Lordships cannot refrain from saying that in their opinion the true construction of the provisions of the ordinance is by no means free from difficulty, and they appreciate the point of view adopted by the learned judges of the Supreme Court, and the reasons stated in support thereof, but after due consideration they have come to the
 G conclusion that the district judge was right in holding that he had jurisdiction to re-open the transaction and to take the account between the plaintiffs and the first defendant. That being so, it was in his discretion to decide whether he should reopen the transaction and take the account, and their Lordships are not prepared to hold that he
 H exercised that discretion wrongly.

Their Lordships, however, are of opinion that the promissory notes which were not enforceable by reason of sect. 10 and were by implication from sect. 13 prohibited, should not have been admitted in evidence to prove the loans. It is to be observed that the admission in evidence

of the notes would make the sections practically valueless. Their Lordships' attention was drawn to certain English decisions, to which, in their opinion, it is not necessary to refer, inasmuch as their Lordships' decision is based upon the true construction of the provisions of the ordinance. The learned counsel for the defendants desired to rely on the provisions of sect. 8 of the ordinance, alleging that the books of the plaintiffs were not kept in accordance with the terms of that section. It appears, however, that the defendants wished to raise an issue upon this point at the trial, and, upon objection by the plaintiffs, the district judge refused to allow that matter to be relied upon by the defendants, as it had not been referred to in the pleadings, and he declined to state any issue in respect thereof. A B

Their Lordships are of opinion that the district judge's decision was right in this respect, since the proposed issue might well have involved the calling of evidence, and they refused to allow learned counsel for the defendants to argue the point. It must be clearly understood that on the further taking of accounts, to which reference will presently be made, the above-mentioned defence will not be open to the defendants. The district judge apparently allowed a rate of interest higher than 12 per cent. per annum in respect of certain loans for short periods. In their Lordships' opinion this was not permissible, and that matter alone would necessitate a further taking of the account. The more important matter, however, is the admission by the district judge of the promissory notes, which were not enforceable, as evidence to prove the loans, which, as already stated, was not permissible. C D E

In their Lordships' opinion the proper course is to remit the case to the Supreme Court in order that the Supreme Court may give such directions as are necessary for taking a further account between the parties to ascertain what amount is due by the first defendant to the plaintiffs in respect of money lent and interest at the rate of 12 per cent. per annum, on the footing that the promissory notes given by the defendants are neither enforceable, nor admissible in evidence to prove the loans. The plaintiffs will be entitled to the usual mortgage decree for such amount, if any, as may be found due to them on the taking of the further account. It will be in the discretion of the Supreme Court to make such orders as are necessary for carrying out this direction, but their Lordships are of opinion that the further account should not be taken by the district judge who took the account in the first instance. It is, of course, not intended to make any reflection upon the learned judge, but he, having seen the promissory notes and admitted them in evidence, might be placed in a difficult position if he were asked to take the account again. F G H

The result is that the appeal must be allowed, and the two decrees of the Supreme Court and the order and decree of the district judge

must be set aside, and the matter remitted to the Supreme Court with the above-mentioned direction. The defendants must pay to the plaintiffs their costs of the appeals to the Supreme Court and two-thirds of their costs of the appeal to His Majesty in Council. There will be no order
A as to the costs of the suit except that the plaintiffs must pay to the defendants the costs incurred by them in respect of the taking of the account directed by the district judge and in respect of the further hearing before the district judge on Dec. 21, 1932. The procedure to be adopted for the taking of the account hereby directed and the costs
B thereof will be a matter for the direction of the Supreme Court. Their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed. The matter to be remitted to the Ceylon Supreme Court, that it may give directions for taking a further account between the parties to
C ascertain what amount is due and interest at the rate of 12 per cent. per annum. The plaintiffs to be entitled to the usual mortgage decree for such amount as may be found to be due. The defendants to pay to the plaintiffs their costs of the appeals to the Supreme Court and two-thirds of their costs of the present appeal. No order as to the costs of the suit, except that the
D plaintiffs pay the costs incurred by the defendants in respect of the taking of the account directed by the district judge and of the further hearing before him.*

Solicitors : *Lee & Pembertons* (for the appellants) ; *Hy. S. L. Polak & Co.* (for the respondents).

E [Reported by T. A. DILLON, Esq., Barrister-at-Law.]

ST. PIERRE v. SOUTH AMERICAN STORES (GATH & CHAVES), LTD.

[KING'S BENCH DIVISION (Branson, J.), November 27, 30, December 1, 2, 3, 4, 7, 8, 9, 10, 11, 18, 1936.]

Money—Lease—Governed by Chilean law—Proof of law of country where decisions not binding precedents—Rent reserved in pesos of a certain weight in gold—“Remit.”

The plaintiffs, successors of the owner of premises in Santiago de Chile, by a lease executed at the Chilean consulate in Paris and drawn in the Spanish language, let the premises to the Chilean Stores for a term of 10 years from 1935 at a rental of 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly, to be paid at the option of the owner either in Santiago de Chile or remitted to Europe according to the instructions which the owner might give one month in advance on the first working day of each month. The second defendants, the South American Stores, joined in the lease as guarantors, but so as to become jointly responsible as primary obligors under the contract. The South American Stores carried on business in the Argentine. All parties by the lease elected domicile in Chile. There was evidence that there was no verbal agreement that the rental should be fixed on a gold basis. In July, 1935, the owner served a notice as follows: “Please take note, till further notice, of my option and of the following instructions,” and then followed instructions for payment in sterling on a gold basis.

HELD: (i) the contract must be construed according to Chilean law.

(ii) the rent was payable in Chilean Banco Centrale notes at par and without any surcharge.

(iii) there had been no valid exercise of the option as to place of payment.

(iv) the rent was to be remitted from Chile and not from any other country. Therefore the plaintiff could not claim to have the rent remitted from the Argentine by the guarantors who were resident there, and thus overcome the difficulties created by illegality or impossibility of remitting this rent from Chile.

(v) in deciding what is the Chilean law, the court may be guided by an overwhelming body of case law deciding the matter in one way, although decisions of the Chilean courts are not binding precedents.

[EDITORIAL NOTE.] The decision that the construction of this lease is governed by Chilean law creates a clear distinction between this case and the other “gold clause” cases. The construction of the word “remit” and the consideration of the effect of the Chilean law rendering the remittance of the rent to England impossible are both matters of interest and importance at the present time. The matter was previously before the court in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K.B. 382, and a previous lease of the same property was before the House of Lords in *De Beêche v. South American Stores, Ltd.* (4).

AS TO THE LAW GOVERNING CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-268, paras. 321-322; and FOR CASES, see DIGEST, Vol. 11, pp. 387-392, Nos. 639-663.]

Cases referred to:

- (1) *Feist v. Société Intercommunale Belge D'Électricité*, [1934] A.C. 161; Digest Supp.
- (2) *International Trustee for the Protection of Bondholders Aktiengesellschaft v. R.*, [1936] 3 All E.R. 407; Digest Supp.

- (3) *Paley (Princess Olga) v. Weisz*, [1929] 1 K.B. 718; Digest Supp.
 (4) *De Beêche v. South American Stores, Ltd., & Chilean Stores, Ltd.*, [1935] A.C. 148; Digest Supp.
 (5) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; 17 Digest 331, 1424.
 A (6) *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; 11 Digest 389, 643.
 (7) *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A.C. 122; Digest Supp.
 (8) *Brown v. Thornton* (1837), 6 Ad. & El. 185; 11 Digest 488, 1402.

ACTION for one month's rent and a declaration as to the rights of
 B the parties in respect of future rent,

The plaintiffs, who resided in Paris, were the owners of property in Santiago de Chile, and the defendants were two limited companies registered and managed in England which carried on business in South America—the first defendant in the Argentine and the second in Chile.

C The premises in question were let to the Chilean Stores, with whom were joined as guarantors, though they were also to be primarily liable, the South American Stores, for a term of 10 years from Sept. 1, 1935, at a monthly rent of 93,500 pesos containing 183,057 millionths of a gramme of fine gold. This rent was to be payable in advance in Chile
 D or to be remitted to Europe at the owners' option.

The property had been occupied since 1909 by the tenants under a previous lease, the rent in that case being payable in sterling. There had been disputes between the parties upon the expiration of the previous lease, and these came before the English courts in the case :
 E *De Beêche v. South American Stores, Ltd., & Chilean Stores, Ltd.* (4).

The effective claims which were before the court were (a) for one month's rent calculated on the gold basis as above set out, and (b) for a declaration as to the basis on which the rent was to be calculated subsequently.

The statement of claim as amended alleged that :

F the rent is upon a gold value basis and is expressed therein in terms of pesos used as units of account measuring the value thereof. The said rent is of the monthly amount of 93,500 pesos each of the value of 183,057 millionths of a gramme of fine gold. Alternatively, if Chilean Law applies, the rent is 93,500 pesos (gold coins) of 183,057 millionths of a gramme of fine gold and must be discharged by delivery of the same or other currency of equal value.

G *A. T. Miller, K.C.*, and *Ernest Hancock* for the plaintiffs.

F. R. Evershed, K.C., *Harold L. Murphy, K.C.*, and *S. H. Smith* for the defendants.

Miller, K.C. : The rent must be calculated on a gold basis because the lease contains a gold clause. It was made in Paris by Chilean subjects
 H domiciled there and two English companies. Chilean law has no application. It is submitted that the law of the place where payment is to be made applies to the construction of this lease. The plaintiffs had an option to require payment of the rent in Europe which was duly exercised. Even if Chilean law applies, it provides that a debt is payable according

to the law of the domicile of the debtor—in this case England, or of the country where under the contract payment is to be made. The word “remitted” does not necessarily imply that the rent must be sent from Chile, but only that it shall be sent to the place indicated by the landlord. Even if Chilean monetary restrictions prevented it being A sent from that country, payment should have been made from England or Argentina.

[Counsel referred to *Chatenay v. Brazilian Submarine Telegraph Co.* (5), *Hamlyn & Co. v. Talisker Distillery* (6), *Feist v. Société Intercommunale Belge D'Électricité* (1), *International Trustee for the Protection of Bond- B holders Aktiengesellschaft v. R.* (2), DICEY CONFLICT OF LAWS, 5th Edn., pp. 136-139, 663.]

Evershed, K.C. : The case pleaded is that the defendants should deliver a certain quantity of gold. The case is put in two different ways by the plaintiffs' Chilean experts : (a) as pleaded in para. 4 of statement of C claim, and that is the only way open on the pleadings ; (b) that the obligation is satisfied by payment of gold coins—93,500 pesos of minted gold. There never was a peso of the weight of gold mentioned. We maintain that the Chilean law applies. The plaintiffs say it is the *lex loci contractus*, i.e., that would be the law of France. If this is so, they D should have proved the French law.

Miller, K.C. : The law of the contract is not Chilean law. If I am right in that, the court should apply English law, i.e., the *lex fori*.

BRANSON, J. : I think some amendment ought to be made. As it stands, I could not give any decision except as to gold weight. E

The pleading was then amended as set out above.

Evershed, K.C. : As to the law of the contract, the question is, what did the parties intend as gathered from their words and the surrounding circumstances ? This is not the first contract between the parties. There was no dispute in the previous case that Chilean law governed. F The document is in the Spanish language, stamped with Chilean stamps. It relates to immovable property in Chile. The parties are two English companies represented by an Argentinian and a Chilean. They have no connection at all with France. In the present case we have the plainest statement that Chilean law governs the contract. Any inference G that may be drawn from the fact that the contract was made in France is rebutted by the fact that it was executed at the Chilean consulate. The law that binds the parties cannot be altered by the exercise of the plaintiffs' option to be paid in Europe. There is only one obligation, and that is determined by the proper law of the contract. If Chilean H law does not apply, the point should have been taken on the application which led to a commission being sent to Santiago. It is a contract to pay legal tender and no more. By Chilean law, even if there was a gold clause, the obligation could be discharged by payment of peso notes

wherever payment was to be made. Lastly, the option was not validly exercised. The obligation was to pay in Chile, and we have tendered the sum due according to the law of that country. If the option was duly exercised, payment is impossible by Chilean law. The South
A American Stores are in all respects in the same position as the Chilean Stores.

[Counsel referred to *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (7), *Paley (Princess Olga) v. Weisz* (3), *Brown v. Thornton* (8).]

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BRANSON, J. : The plaintiffs are the successors of an owner of premises in Santiago de Chile : the defendants are two English companies, subsidiaries of Harrods, Ltd., the first one carrying on its business in Santiago, the other in the Argentine. By an agreement dated
C June 17, 1931, the predecessor of the plaintiffs leased the premises to the Chilean Stores for ten years from the expiration of the then current lease, the South American Stores joining as guarantors, but so as to become jointly responsible as primary obligors for the due execution of the contract.

D This action is brought by the plaintiffs for what they contend to be the correct amount payable in respect of one monthly instalment of rent and for a declaration as to the rights of the parties under the lease in respect of further payments of rent.

E The first point which arises for decision is, what is the proper law of the contract. The answer is clear. The contract was entered into in Paris at the Chilean Consulate ; it is in the Spanish tongue, and relates to the leasing of immovable property situate in Chile ; the parties are Chileans of the one part, and, of the other, a company whose business is in the Argentine. Both parties elect domicile at Santiago for all
F purposes of the contract, the recital of which ends :

And before me (to wit the Chilean Consul) they agreed as follows for the legality of the contract in Chile.

The contract, by art. 8 thereof, expressly incorporates sections of the Civil Code, which can be none other than that of Chile ; and the powers
G of attorney under which the contract was executed are to enable its execution to be made binding according to Chilean law. I have no hesitation in holding that the proper law of the contract is the Chilean law. It is my duty, therefore, in ascertaining the rights and duties of the parties under the contract, to apply the canons of construction which
H would be applied by a Chilean court, and to admit and consider such evidence as a Chilean court would admit and consider, in order to arrive at the intention of the parties. The ambit of matters which a Chilean court will consider, in order to ascertain the true intention of the parties to a contract, is much wider than that allowed under English law.

Evidence is admitted of negotiations, verbal or in writing, antecedent to the contract, and of subsequent writings passing between the parties, or emanating from one of them—in the latter case, however, with the limitation that such writings are available only against the party from whom they emanate. Under art. 1560 of the Civil Code :

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The intention of the parties being clearly known, this should be abided by more than the literal meaning of the words.

Art. 2 of the lease, upon the true effect of which the main issue of the case depends, reads as follows, according to the translation given by the interpreter sworn in the case :

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The rental is 93,500 pesos of 183,057 millionths of a gramme of fine gold monthly, which shall be paid at the option of the owner either in Santiago de Chile at the residence or office of the latter or of his representatives, or remitted to Europe according to the instructions which the owner may give one month in advance on the first working day of each month.

C

The words translated as “which shall be paid,” “qui seran pagados,” agree in number and gender with the word “pesos,” as does the word “remesados,” translated as “remitted.”

The first dispute which arises upon this clause is whether, as the defendants contend, the reference in it to milligrammes of gold is no more than a transcription of art. 1 of Decree Law 606 of the statutory description of the monetary unit of Chile by that Law established ; so that all the clause directs to be paid is so many monetary units of Chile ; or whether, as the plaintiffs contend, the clause is to be construed as a “gold clause” : namely, to adapt from LORD RUSSELL OF KILLOWEN, in *Feist v. Société Intercommunale Belge d'Électricité* (1), at p. 172, as if it ran : “The rental is an obligation to pay in pesos a sum equal to the value of 93,500 pesos, if paid in gold coins, each containing 183,057 milligrammes of fine gold.” If the proper law of the contract had been English, I should have had to consider whether the decisions of the House of Lords in *Feist v. Société Intercommunale Belge D'Électricité* (1), or that of the Court of Appeal in *International Trustee for the Protection of Bondholders Aktiengesellschaft v. R.* (2) afforded me any guidance, notwithstanding certain differences in phraseology ; but as I have to apply Chilean law, I cannot rest upon those decisions, and must proceed to discover, if I can, from the evidence how a Chilean court would decide the case. This inquiry involves two branches : (a) How a Chilean court would construe the clause, apart from any evidence of the intention of the parties ; and (b) whether the evidence as to the negotiations and the conduct of the parties in this case should lead to any different result.

With regard to (a), I have had the evidence of four distinguished lawyers, two called by each side. Señor Montero, called for the plaintiffs, did not help them on the question of construction. His view was that

the contract called for payment in Chilean gold coins—minted gold—and he stated expressly that the plaintiffs had no right to demand notes with a surcharge to make up the difference between their current value and their face value in gold. He stated that minted gold coins were
 A unobtainable in Chile in 1935, and, when pressed to say how then should the defendants discharge their obligation, refused to commit himself, saying it was not for him to suggest a way, but for them, who had contracted to make such a payment.

Señor Riesco, who gave his evidence *ore tenus*, said that in his opinion
 B the consideration might be demanded in gold or its equivalent; but it appeared that what he meant was that the creditor would sue for the minted gold, and, having recovered judgment, would, if the debtor did not pay it, proceed to execution, and get paid in currency a value equivalent to that of the minted gold. He said subsequently that it might be
 C possible for the creditor to sue in the first instance for notes with a surcharge. Both the defendants' legal witnesses stated categorically that in their view the proper meaning of the words in art. 2 of the lease was that payment of the rent should be made in legal tender, the current tender of Chile, and that the words referring to the gold content of the
 D currency did no more than to indicate one of the characteristics of the legal or current tender provided for by art. 1 of the Law 606. In support of this view, they cited a number of decisions of the Chilean courts, dealing with clauses similar to that in the present case, at least in that the gold content of 183,057 millionths of a gramme of fine gold was expressly
 E mentioned therein. Their effect was agreed to by Señor Riesco in cross-examination to be as follows: with the possible exception of one case, *Lipschutz v. Concepcion University*, where the phrase was "pesos of not less than 6*d.*," there has been no case which has decided that a clause like this is to be taken as a "gold clause." On the other hand,
 F there have been several cases where the courts, including courts of appeal, have held such clauses not to be "gold clauses." One of them was *Andreucis v. Kiesula Marmakis & Co.*, a decision of the First Court affirmed on appeal, which Señor Riesco said is clear in the defendants' favour. Another was *Vergara v. Mujica*, in which, as Señor Riesco
 G agreed, the First Court and the Court of Appeal decided exactly the point raised here in the defendants' favour. In the case of *Vergara v. Garcia Blasquez*, the First Court did hold a clause which ran: "In legal tender existing at this date, that is to say, 183,057 millionths of fine gold per peso," to be a gold clause; but its decision was reversed by
 H the Court of Appeal. It is said, and truly, that decisions of the Chilean courts are not binding precedents (art. 3 of the Civil Code); but where it appears, as it does here, that no less than 23 decisions, by 16 different individual judges of first instance and courts of appeal, have proceeded upon the one view, and only one (for the *Lipschutz* case was

decided in the first instance by a Labour Tribunal) upon the other, the chances of the former view being upheld by the Chilean courts seem to be overwhelming. I consider it unnecessary to deal with the cases decided before the passing of the Currency Laws 486 and 606, when entirely different considerations applied. The courts which have so A decided in favour of the defendants' view had a knowledge of the history of the monetary laws of Chile, and of the views of the meaning of a reference in a Chilean contract to the gold content of the Chilean monetary unit established from time to time, taken by the Superintendency of Banks, the Board of Fiscal Defence and the like, and of the monetary B situation in Chile, to which I cannot hope to attain. I do not propose to deal with the reasons given by those courts for coming to the conclusion which they reached, except to say that they appear to me to be much more convincing than the reasons urged by the plaintiffs' witnesses for saying that they were wrong. But if it had been otherwise, I would C not presume to differ from the almost unanimous opinion which those courts have expressed. That this is the proper attitude appears from the observations of VISCOUNT SANKEY, L.C., in the former litigation between these parties reported [1935] A.C. 145, at p. 160. He was dealing there with the question as to whether the operation was or was D not illegal, and he said :

Beyond that an English court will have regard not merely to their own views of the foreign law, but to the interpretation put upon it by a competent foreign authority : see *Paley (Princess Olga) v. Weisz* (3). In my opinion we ought not to disagree with the conclusion arrived at by the competent authority in Chile, or to differ from their construction of the law.

If it be proper to express my own view of the clause in the present case, it is that the grammatical agreement in gender and number between the words " pesos," " pagados," and " remesados," the fact that there is not in this case an obligation fixed, followed by directions that it shall be paid in gold coins, and the fact that the stipulated rent could at the F date of the contract have been paid exactly in gold condors, coins authorised by art. 1 of Law 606, or in convertible Banco Centrale notes, indicate that the parties were expressing an intention to measure the obligation and to agree to its discharge in the existing monetary notes of the country, and not on a gold value basis.

I turn then to the question whether anything passed between the parties, other than the language of the contract itself, which indicated that that language should bear some other interpretation. The evidence as to this consists partly of documents which came into being at the time and partly of oral evidence given before me. I am satisfied that H no verbal agreement was arrived at that the rental should be fixed upon a " gold clause " basis. The true position is that the parties agreed to be bound by the form of words inserted in the contract, Mr. Béeche with the notion at the back of his mind that he could get them construed as

a "gold clause," the defendants thinking that they did no more than describe the sort of pesos to which the contract referred. Thus the rights of the parties depend upon the proper construction of those words, uncontrolled by any verbal agreement. This, as I have already said, would be held in a Chilean court to be that the obligation was one dischargeable, in the events which have happened, in Chilean Banco Centrale notes at par, and without any surcharge. So much for the quantum.

The next question is as to the place of payment. Apart from any exercise of the option reserved to the plaintiffs, the place of payment is clearly Santiago de Chile. But it is said that the plaintiffs have exercised their option in such a manner as to make the place of payment London. The defendants on the contrary contend that the option has never been validly exercised at all. The material words of the contract are :

which shall be paid at the option of the owner either in Santiago . . . or remitted to Europe according to the instructions which the owner may give.

The letter in which Mr. Beéche purported to exercise this option is that of July 6, 1935. It is worth quoting from, in order to show the contortions of language to which Mr. Beéche was driven in the attempt to support his construction of the contract. Referring to the lease, he says :

Art. 2 says that it belongs to me to give the instructions, and that it is at my option where to be paid ; in consequent please take note, till further notice, of my option and of the following instructions :

He told me in the box that he meant that to imply that he was exercising his option once and for all, and that the words "till further notice" only applied to the instructions. I do not believe it. The letter goes on :

The 93,500 weights of 183,057 millionths of grammes of refined gold to be paid to me the first day of each month being each of those units of weight equivalent to sixpence gold (as in purpose we choose that weight to facilitate the conversion), the monthly amount is then £2,337 10s. gold, and taking the premium on gold in regard to the pound sterling ruling in London the first day of each month, you can then easily know the amount to be paid to me monthly and my option and instructions are to remit that amount from London to me in a sterling cheque on London.

The defendants replied to that letter on July 13, saying that they did not admit his interpretation of the obligations, and said further that no remittance could be made "without the prior sanction of the Exchange Control Commission in Chile." To that Mr. Beéche wrote on July 15 : "Your obligations are quite clear" ; and "I have the right to choose where to be paid" ; and he insists upon being paid "with a cheque on London remitted to me from London to France" ; in consequence of which he argues that the Exchange Control Commission in Chile has got nothing to do with the matter.

In my opinion, that is no valid exercise of the option conferred by the agreement. In the first place, the agreement clearly indicates that the rent is to be remitted from Santiago. The word "remit" involves both a *terminus a quo* and a *terminus ad quem*, and when what is to be remitted is pesos of Chilean currency, naturally the *terminus a quo* must be Chile. Mr. Beéche was wrong both in the amount for which he called and in the instructions which he gave. A

The parties, however, desire not only a decision as to the past, but also a declaration as to the future. It is necessary for me, therefore, to state what, in my opinion, is the true meaning of the provisions of the agreement as to payment. It is that the currency to pay the rent will be provided in Chile ready to be paid there if the option is not exercised, and ready to be remitted from there if it is. If the option is exercised, and instructions are given as to how, and to what place, the rent is to be remitted, payment is made in Santiago when the necessary exchange is bought and despatched according to those instructions. B
If the plaintiffs' contention that payment is not made until the remittance is received was sound, the contract should have been read "to be paid either in Santiago . . . or at any place in Europe": the word "remitted" being not only superfluous but positively misleading on that hypothesis. C D

If my decision is so far correct, it disposes of the plaintiffs' claim in this action against the Chilean Stores. An attempt was made by the plaintiffs to differentiate between the position of the Chilean Stores and that of the South American Stores, but in my opinion that attempt must fail. It depends upon the contention that the obligation to remit was not confined to sending a remittance from Chile, but that it included an obligation to remit from anywhere. I have already decided against this contention. It was really only an answer to the allegations in the defence that it was illegal or impossible under Chilean law to remit gold or the equivalent of a gold value from Chile, for it was said the South American Stores were primary debtors and not resident in Chile, and that the obligation was to remit, not Chilean currency from Chile, but the equivalent of a gold value from anywhere, so that no illegality or impossibility in making such a remittance from Chile could excuse them from performing their obligation. E
In the view that I have taken, no question of illegality or impossibility has so far arisen, because the option of the plaintiffs to call for remittance of the rent from Chile to Europe has never been validly exercised. Evidence was called, however, as to the possibility of making remittances from Chile, as to which I think it right to state my conclusions in case any question may hereafter arise upon this point. F G H

I was satisfied that the Exchange Control Commission set up in Chile, under law 5107 of Apr., 1932, would not, in Aug., 1935, authorise the

purchase of exchange in Chile to enable rents of premises there to be remitted to absentee landlords to be spent in Europe. This appears clearly from the evidence of Mr. Young, who, as general manager of the Anglo-South American Bank, was at Santiago in Jan., 1932, to Jan., 1935, and was intimately acquainted with the monetary situation there. No evidence was called to suggest that the situation was easier at any later period, or that Mr. Young's evidence, that on the contrary it got steadily worse, was not true. While this situation continues, it is not possible for either of the defendant companies to carry out instructions which the plaintiffs may give for the remission of rent from Santiago to Europe. If the plaintiffs exercise validly *qua* the contract their option to call for such a remittance, they are asking for an impossibility which, as it has supervened by the operation of the law of the place of performance, excuses the defendants from performance. The only alternative is for the plaintiffs to appoint someone in Santiago to receive there the rents which the defendants are ready and willing to pay, and have in fact lodged in court in default of any such appointment.

I ought in conclusion to state that the claim made by the statement of claim for the payment of £7,500 was settled by the parties during the hearing of the case.

The result is that the action fails and must be dismissed with costs.

Solicitors: *Smiles & Co.* (for the plaintiffs); *McKenna & Co.* (for the defendants).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

NOTE.

OPPENHEIMER v. LOUIS ROSENTHAL & CO.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), November 10, December 7, 8, 17, 1936.]

[Reported p. 23 ante.]

The Editors are indebted to SLESSER, L.J., for the following amendments, shown in italics, of the report of his judgment:

On p. 26, 1 line above C: I can only add *on the question of jurisdiction* that in my view . . .

The last sentence of the judgment beginning "Both cases" should be replaced by the following: *In this case the criticism of the alleged foreign forum raises a question of principle, and is not one merely of convenience which might be solely a matter of discretion.*

THE MADRID.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.),
December 16, 21, 1936.]

Conflict of Laws—Stay of proceedings—Admiralty action—Lis alibi pendens A
—Whether bar to proceedings in England.

Companies—Foreign company—Share register in England—Place of business—
Service of writ—Companies Act, 1929 (c. 5), ss. 344, 349, 352.

The defendants' ship collided with the plaintiff's ship in Argentine waters and sank, becoming a total loss. The defendants brought an action in Argentina against the plaintiff, who filed a counterclaim which he subsequently withdrew. The plaintiff then brought an action against the defendants in England. The defendants were a company carrying on business in Argentina, and had established a share register in London, the name of one D. being registered as a person authorised to accept service of process on behalf of the company. In the absence of D. abroad, the plaintiff left a copy of the writ at the defendants' address in London:—

HELD: (i) the defendants had a "place of business" within the jurisdiction of the English courts, and they were amenable to that jurisdiction for all purposes.

(ii) the writ had been properly served.

(iii) the plaintiff was not debarred from his right to proceed in an English court by reason of the fact that he was a party to proceedings in Argentina in respect of the same subject matter.

[EDITORIAL NOTE. In this case the proposed plaintiff was unable to obtain full relief in the foreign court. The defendants had so far complied with the Companies Act, 1929, by establishing a share register in England, that it was possible to effect service of the writ upon them there, and this rendered it possible for the plaintiff to sue in England and avoid a severe limitation of liability abroad, although the defendants had commenced an action in the Argentine.

As to *Lis Alibi Pendens*, see HALSBURY, Hailsham Edn., Vol. 6, pp. 357-360, paras. 414, 415; and FOR CASES, see DIGEST, Vol. 11, pp. 477-480, Nos. 1310-1330. The provisions of the Companies Act, 1929, so far as they are material, are referred to in the judgment: for the sections in full, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 2, pp. 990, 992, 993. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 1643-1645.]

Cases referred to:

- (1) *Employers' Liability Assurance Corpn. v. Sedgwick Collins & Co.*, [1927] A.C. 95; Digest Supp.
- (2) *The Janera*, [1928] P. 55; Digest Supp.
- (3) *Dawkins v. Saxe Weimar (Prince Edward)*, *Dawkins v. Wynyard, Dawkins v. Stephenson* (1876), 1 Q.B.D. 499; 38 Digest 79, 566.
- (4) *Fester Fothergill & Hartung v. Russian Transport & Insurance Co.*, [1927] W.N. 27; Digest Supp.
- (5) *Badcock v. Cumberland Gap Park Co.*, [1893] 1 Ch. 362; 13 Digest 429, 1528.
- (6) *Sabatier v. Trading Co.*, [1927] 1 Ch. 495; Digest Supp.
- (7) *The Lalandia*, [1933] P. 56; Digest Supp.
- (8) *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1; 11 Digest 410, 783.
- (9) *Reresby (Owners) v. Cobetas (Owners)*, [1923] S.L.T. 492.

MOTION by the defendants to set aside a writ and alternatively to

stay all further proceedings in an action by the plaintiff to recover damages for injury to his ship.

The facts are set out in the judgment.

A *Kenneth S. Carpmael, K.C.*, and *H. G. Willmer* in support of the motion, for the defendants.

G. St. C. Pilcher, K.C., and *H. L. Holman* in opposition to the motion, for the plaintiff.

B *Carpmael, K.C.* : To establish a business for a limited purpose does not make a company amenable to the service of writs, except for things arising out of that limited purpose.

BUCKNILL, J. : Either you have a place of business or you have not. The statute says that your registered office is a place of business.

C *Carpmael, K.C.* : It is a limited place of business and therefore the writs that can be served there are similarly limited. The service of the writ was bad and must be set aside : see *Fester Fothergill & Hartung v. Russian Transport & Insurance Co.* (4).

D There is a suit pending elsewhere. It is an abuse of the process of this court to allow the plaintiff to proceed here. The collision took place in Argentine waters, and Argentine law applies to this case. The defendants' vessels are employed solely in these local waters and never come to England. All the witnesses from the defendants' vessel live in the Argentine. The expense of bringing them to England or taking their evidence on commission would be enormous. The plaintiff's principal witness, the pilot, is a local one too ; and there are independent witnesses, also local. There will be the expense of two actions if this one is allowed to go on. Against this it is said that under the Argentine law there is no remedy for the plaintiff and therefore he is entitled to come here to get it. But I submit that provides me with a complete defence. Where the foreign law merely limits the liability, then the process of the English courts is open, because the limitation of the foreign law goes only to the remedy ; where, however, by the operation of foreign law the liability is extinguished altogether, then no action will lie in this country. This court will not allow an action to go on which is bound to fail.

G [Counsel referred to : *Badcock v. Cumberland Gap Park Co.* (5), *Employers Liability Assurance Corp'n. v. Sedgwick Collins & Co.* (1), *Sabatier v. Trading Co.* (6), *The Lalandia* (7).]

BUCKNILL, J. : If the plaintiff wants to proceed in this court he is entitled to issue his writ.

H *Carpmael, K.C.* : The submission that the plaintiff has no kind of case at all will have to be dealt with and may as well be disposed of now. *Phillips v. Eyre* (8). The defendants are being harassed ; and having regard to all the facts, the plaintiff's action is frivolous and vexatious.

Pilcher, K.C. : The place of business was where the share register was

to be found. There has never before been a case of a defendant seeking to set aside a writ or to stay proceedings because he says he has a rock-bottomed defence. If the defendant company wants a stay it must satisfy the court that in fact under Argentine law it is entitled to abandon its ship and to limit its liability to nothing, and that it has in fact done so. A Where one of the parties is a plaintiff in this country and a defendant in another country he is never barred from taking proceedings in this country. See *The Janera* (2). Even if one party is a plaintiff in two countries, he may pursue his remedies in both.

Carpmael, K.C., in reply : This case is on the same footing as *Dawkins v. Saxe Weimar (Prince Edward)* (3). That also was a motion to stay as frivolous and vexatious because the action would not lie : and the action was stayed because it must have failed. *Owners of S.S. Reresby v. Owners of S.S. Cobetas* (9) is also on all fours with this case. There, C there was a collision in French territorial waters. The French law as to liability was the same as the Argentine. There was the same motion as here, and it was decided against me ; but DICEY (5th Edn. pp. 987-990) criticises this decision. In any event, it is not binding on the English court. DICEY's remarks are clearly applicable to this case.

Pilcher, K.C., in reply. D

BUCKNILL, J. : This is a motion by the *Compania Argentina de Navegacion Mihanovich Limitada* (hereinafter called "the company") for an order that a writ of summons issued by the plaintiff as owner of the Greek steamship "*Epaminondas C. Embiricos*" and served upon E the company be set aside, or, alternatively, that all further proceedings in the action be stayed.

The writ in question was addressed to the company of 14, Leadenhall Street, in the city of London. The indorsement on the writ is as follows : F

The plaintiff claims compensation for damage and loss occasioned by and arising out of a collision which occurred between the plaintiff's steamship "*Epaminondas C. Embiricos*" and the defendants' steamship "*Madrid*" in the River Parana during the month of Sept., 1936, owing to the negligence of the defendants or their servants.

The first point taken on behalf of the company as a ground for setting G aside the writ was that the company does not carry on business within the jurisdiction of this court.

The facts relevant to this point are that the company is a corporation carrying on business within the territory of the Republic of Argentina, Brazil, and the ports of the coast of South America. The company in H 1935 established a share register in London, at the offices of the Anglo-South American Bank, Ltd., at 117, Old Broad Street. In compliance with the Companies Act, 1929, s. 344 (1) (c) the company, having established a place of business within Great Britain in the form of a share

register, duly registered with the Registrar of Companies the name of Mr. José Arnaldo Dodero, as a person resident in Great Britain authorised to accept, on behalf of the company, service of process and any notices required to be served on it.

- A It was argued on behalf of the company that it had established a place of business in Great Britain solely for the purpose of a share register, and that therefore it was only amenable to the jurisdiction in respect of claims connected with the share register. I do not think this is sound. The Companies Act, 1929, s. 352, enacts that the expression "place of business" includes a share transfer office. The company has, in my view, a place of business within the jurisdiction, and is therefore amenable to the jurisdiction for all purposes. In *Employers' Liability Assurance Corp'n. v. Sedgwick Collins & Co.* (1), at p. 115, LORD PARMOOR pointed out that the main object of the Companies Act, 1908, s. 274 (now replaced by sect. 344 of the Act of 1929), was to take away any difficulty in the service of a writ on foreign corporations carrying on business in this country, and in effect to place a foreign corporation for this purpose on the same footing as an English company, and liable to the service of a writ under a similar form of procedure.
- C

- D In this case before me, the company, to quote LORD PARMOOR again, by filing with the Registrar of Companies the name and address of Dodero, submitted voluntarily to the jurisdiction of the English courts, and, on this account, cannot subsequently be heard to object to such jurisdiction. I do not think that a company can submit to such a limited jurisdiction as is suggested on behalf of the company.
- E

- The second point taken on behalf of the company was that the writ had not been properly served. Sect. 349 of the 1929 Act requires in effect that the writ should be served on the person whose name has been delivered to the Registrar, in this case upon Dodero. But the section goes on to say that if at any time such person cannot for any reason be served, the writ may be served on the company by leaving it at any place of business established by the company in Great Britain.
- F

- In the present case, when the writ was issued Dodero was abroad, and a true copy of the writ was left at the offices of the Bank of London and South America, Ltd., at 6, Tokenhouse Yard, London, it being the place where the share transfer office of the company was established at that time. This appears to me to have been a proper service under the circumstances.
- G

- The third point taken was that the proceedings in this court should be stayed because there were other proceedings pending abroad between the same parties in respect of the same collision and that in these circumstances these proceedings were vexatious and oppressive.
- H

The facts relevant to this point are that the collision occurred in the River Parana, and that on Sept. 30, 1936, the company instituted an

action *in rem* against the plaintiff's vessel in the courts of the Republic of Argentina, claiming damages in respect of the total loss of the "Madrid" and her cargo. In that action the "Epaminondas C. Embiricos" was arrested, and eventually a guarantee in lieu of bail was given by the plaintiff. A

On Oct. 14, 1936 (fourteen days after the writ in the action in this court was issued), the plaintiff, through the master, filed in the action in Argentina a counterclaim in respect of the damage sustained by the "Epaminondas C. Embiricos," but on Oct. 27 he filed a further document whereby he withdrew his counterclaim. B

It appears to me that the plaintiff has not by reason of this action debarred himself from his right to proceed in this court on the writ issued by him. A very similar state of facts was considered by HILL, J., in *The Janera* (2). In his judgment, HILL, J., said at pp. 57, 58 :

It seems to me quite clear that the court ought not to stay a plaintiff in the courts of this country on the ground that he happens to be a defendant elsewhere. . . . It is said that I ought to stay the action here. . . . In general, if the cross-action brought by the plaintiffs were still proceeding in Egypt I think the proper course would have been to put them to election, but as they have already elected and acted upon their election, and have abandoned the proceedings in Egypt, and as there are no proceedings by them anywhere else, I cannot interfere or deprive them of a right which otherwise undoubtedly they possess, to sue in this country. C

It was argued on behalf of the defendant company that in this case these proceedings were vexatious and oppressive not only because the liability for the collision could be more conveniently decided in the courts of Argentina, that being the country where all the defendant company's witnesses resided, but also because the plaintiff had no effective remedy in this court against the defendant company, owing to the fact that the collision in question caused the "Madrid" to sink and to become a total loss. The defendant company put in an affidavit by an Argentine lawyer in which he argued that, according to the law of the Argentine Republic, when a vessel has become a total loss in consequence of a collision her owners are excused from all liability for the collision, that is to say, that their liability being limited to the property, *i.e.*, the ship and any freight available, if the ship is of no value, then there is no liability whatever. D

On behalf of the plaintiff it was argued that he was entitled to issue his writ and have the question of the liability of the defendant company for the collision determined in this country, and that the attempt of the defendant company to set aside the writ on the ground that the defendant company was not under any liability, was premature. E

It is no doubt true that the court has power to stay proceedings in an action if, on the face of it, there is no cause of action. This was done for instance in the case of *Dawkins v. Saxe Weimar (Prince Edward)* (3). In that case, BLACKBURN, J., said at p. 502 : F

Have we, although we see the action is utterly groundless, a right to stop it G

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summarily ? I grant that is a jurisdiction which in all cases should be very carefully exercised by the court.

Again, MELLOR, J., in that case, said at p. 503 :

A It is manifest upon the face of the declaration and the affidavits that it would come to a non-suit. I think we should be allowing the time of the public and the court to be wasted if we did not interpose and take this course.

B It appears to me that, at the present stage of the case, it would be quite impossible for me to say that the plaintiff's action is utterly groundless or that it must come to a non-suit. The question will turn upon the provisions of the law of Argentina, as well as upon the facts as to the state of the " Madrid," and the facts upon either of these heads are not agreed or determined. There will also be the point for decision whether the Argentine law or the English law applies to this action in this court, so far as the liability of the company is concerned.

C It was finally suggested by Mr. Carpmael, on behalf of the company, that it would be convenient, and a saving of expense, to decide the question of the liability of the company upon the hearing of this motion. Mr. Pilcher, on behalf of the plaintiff, declined to agree to such a course, and in the absence of such agreement I cannot decide a disputed question of liability on a motion to set aside this writ. According to the law of D England, the company is *prima facie* liable for the negligent navigation of its ship, and a claim based on such alleged navigation *prima facie* discloses a good cause of action.

E Solicitors : *Thomas Cooper & Co.* (for the defendants) ; *Ince, Roscoe, Wilson & Glover* (for the plaintiffs).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

WILLCOX v. KETTELL.

CHANCERY DIVISION (Clauson, J.), December 3, 4, 1936.]

*Trespass—Adjoining buildings—Leave to underpin wall—Extension of concrete foundation beyond wall.**Practice—Costs—Action—Payment into court with denial of liability—Lesser amount recovered at trial—Costs after payment in—R.S.C., Ord. 22.* A

(i) The plaintiff and the defendant owned adjoining properties. The defendant, wishing to rebuild his property, obtained leave from the plaintiff to underpin the plaintiff's wall which abutted upon the defendant's building. The defendant's new building was to have girders upon a steel cage, and to support this steel framework it was necessary to place stanchions at intervals along the boundary. Where these stanchions were placed the defendant extended the concrete foundations some 20 ins. beyond the plaintiff's wall into the plaintiff's land :— B

HELD : the permission to underpin the plaintiff's wall did not authorise the extension of the concrete foundations into the plaintiff's land, and this extension amounted to a trespass. C

(ii) before trial, the defendant paid £100 into court with a denial of liability. At the trial the plaintiff recovered £31 10s. damages :—

HELD : the plaintiff ought to have his costs of the action up to the time of payment in, and the subsequent costs of the issue of trespass. The defendant should have the costs since payment in of the issue as to damages. D

[EDITORIAL NOTE.] The question to be decided here is the extent of the authority given by a licence to underpin a wall for the purpose of modern building. The case also includes a full consideration of the exercise of the judge's discretion as to costs where money has been paid into court with a denial of liability. The rule regulating this question was altered in 1933.

AS TO THE TRESPASS TO LAND, see HALSBURY, 1st Edn., Vol. 27, Trespass, pp. 860, 861, para. 1513; and FOR CASES, see DIGEST, Vol. 43, pp. 409-411, Nos. 315-340. E

AS TO COSTS WHERE PAYMENT IN IS MADE WITH DENIAL OF LIABILITY, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 149, 150, paras. 264, 265; and FOR CASES, see DIGEST, Practice, pp. 489-492, Nos. 1664-1681; and see YEARLY SUPREME COURT PRACTICE, 1937, pp. 370, 371.] F

Case referred to :

(1) *Powell v. Vickers, Sons & Maxim, Ltd.*, [1907] 1 K.B. 71; Digest, Practice, 490, 1668.

ACTION for damages for trespass. The facts are fully set out in the judgment. G

Sir Gerald Hurst, K.C., and *George Maddocks* for the plaintiff.

Fergus D. Morton, K.C., and *C. Montgomery White*, for the defendant.

CLAUSON, J. : Mr. Kettell is the owner of an hotel in the High Street, Combe. By the side of Mr. Kettell's hotel is a hall called Queen's Hall (I think it is a cinema), belonging to Mr. Willcox. Mr. Willcox had been in the hotel, had been on perfectly friendly terms with his neighbour, and no doubt each of them reciprocated an occasion afforded by the proximity of each other's premises. Certainly Mr. Willcox was H

quite frequently on Mr. Kettell's premises. Mr. Kettell was minded to rebuild his hotel, and he was naturally anxious that there should be no trouble or damage to his neighbour's premises. He met Mr. Willcox, and exactly what the conversation was naturally they cannot remember, but the net result of it was that it was arranged that Mr. Kettell should have liberty to underpin the wall on Mr. Willcox's premises, which abutted on Mr. Kettell's building. Then Mr. Kettell proceeded to underpin the wall in the usual and perfectly proper manner: taking down along the edge of the wall, putting in a flange or footing of cement, filling up the space between the wall and the footing with cement, and dealing with the wall with a certain number of bricks, which one could describe as extending the wall down to the concrete. If Mr. Kettell had been going to build against Mr. Willcox's wall in the old-fashioned way, I think no trouble would have arisen at all. But what Mr. Kettell was proposing to do was to build his new premises in a way which is common nowadays, with girders on a steel cage; and for that purpose it was necessary that there should be stanchions at intervals along the boundary to support the steelwork. I have no doubt that it appeared very soon that, in the course of underpinning the wall, if arrangements could be made to facilitate the spacing and support, at the proper distances, of Mr. Kettell's stanchions, it would be very much to his advantage. Accordingly he underpinned the wall in the ordinary way where there was not to be a stanchion, and, where there was to be a stanchion, he not only put concrete and bricks under, or substantially under, the old wall, but he also extended the concrete foundation into Mr. Willcox's land, so as to form a base which would be used, and in fact I gather has been used, as a support for the stanchions. Taking the width of Mr. Willcox's wall as 14 ins.—it does not seem to have been as much as that, but substantially so—the underpinning process in itself involved putting, in the brickwork in a very old wall, a band of concrete of substantially 14 ins. No doubt the concrete would extend a little beyond the brickwork, but at the spot at which Mr. Kettell was minded to put a stanchion, instead of there being a narrow band of concrete, there would be a square or rectangular bit of concrete made, which would extend on each side of the wall, on Mr. Kettell's side, so as to hold the stanchion, and on Mr. Willcox's side, somewhat beyond the wall, so as to serve the purpose of effectively supporting the stanchion. The stanchion could, perhaps, have been supported by other means, but that was quite an obvious and convenient way of supporting it, to which no objection could be made by anybody, except that, as far as the bit which was required to support the stanchion was concerned, it protruded into Mr. Willcox's land some 20 ins. beyond the inner edge of Mr. Willcox's wall, up to which, for underpinning purposes, Mr. Kettell was, of course, free to put his concrete.

The effect of these arrangements for the support of this stanchion was that concrete would be protruding into Mr. Willcox's land to an extent of some 20 ins., and this was not authorised by a mere permission to underpin. I have no evidence before me at all to suggest that Mr. Willcox knew, as a matter of fact, what was being done so far as the protrusion was concerned. There were the usual differences in the evidence as to how far he saw the work. I have not the least doubt that Mr. Willcox went there quite often and knew what was going on, that he looked at where the men were working at the underpinning, and so on, but I have not any reason to suppose that it ever entered his mind that, besides the underpinning, this extra arrangement was being made with a view to the support of Mr. Kettell's stanchion. I cannot help thinking that if Mr. Willcox had known of it he would probably not have raised any objection. But that is not the point. Some trouble has arisen, and now it is necessary for me to decide whether the permission which Mr. Willcox gave to Mr. Kettell authorised the extra protrusion into Mr. Willcox's land of the bases, as they are called, for the stanchion. So far as actual permission is concerned, quite plainly permission was given for the underpinning. I do not believe that Mr. Willcox knew anything about it. He knew the underpinning was going on. It was rather suggested that he could look down the trench and see the protrusion going on. There was a remark made, for which there is some justification—in fact, nobody can dispute it—that you cannot see through a brick wall. I perfectly agree with the view that was suggested, that, if he had looked down the trench, he would have been able to see that there was some concrete protruding into his ground beyond the line of the wall.

Accordingly, I can find no express leave and licence, and I can find no circumstances from which I can infer leave and licence. It is said that Mr. Willcox was careless, and that he ought to have seen that somebody else was digging into his property. I confess that I do not take that view. He was entitled to assume that the work would not go beyond the permission that was given, and I find that it was not made clear to Mr. Willcox as to what was proposed to be done as to these bases. I think that, if Mr. Kettell had explained it, probably there would have been no difficulty. However, I am satisfied that it was not explained, and I am satisfied that the leave and licence did not extend to this protrusion into Mr. Willcox's land.

[His Lordship considered the question of damages for the trespass and awarded the plaintiff £31 10s., and High Court costs.]

Morton, K.C.: The defendant paid £100 into court. That being so, and as the plaintiff has continued with his action and has recovered £31 10s. by way of damages, I ask your Lordship to order that the costs up to the time of payment in be paid by the defendant and the costs

since be paid by the plaintiff. There was a denial of liability, but in my submission that makes no difference. See R.S.C., Ord. 22, r. 1, which provides :

A (1) In any action for a debt or damages or in an admiralty action the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim.

(3) The notice . . . shall state whether liability is admitted or denied . . .

Then r. 2 (1) seems to be quite general :

B Where money is paid into court under r. 1, the plaintiff may, within 7 days of the receipt of the notice of payment into court . . . accept the whole sum or any one or more of the specified sums in satisfaction of the claim or in satisfaction of the cause or causes of action to which the specified sum or sums relate.

Rule 2 (3) is as follows :

C If the plaintiff accepts money paid into court in satisfaction of his claim . . . he may, after four days from payment out . . . tax his costs incurred to the time of payment into court, and 48 hours after taxation may sign judgment for his taxed costs.

Rule 6 says :

D Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into court under the preceding rules of this order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment.

E The position is this, then, under these rules the plaintiff could have taken £100 and costs at the time of payment in. That he did not choose to do, and he has now recovered £31 10s. He ought to pay the defendant's costs as from the time of payment in.

Hurst, K.C. : This case is covered by a decision of the Court of Appeal : *Powell v. Vickers, Sons & Maxim, Ltd.* (1). See THE ANNUAL PRACTICE, 1937, at p. 405 :

F If defendant in an action for unliquidated damages denies liability but pays money into court, and plaintiff proceeds with action, there are two distinct issues raised, namely, (a) whether the defendant is under any liability to the plaintiff, and (b) whether the sum paid in is sufficient to cover the liability, if any. If the plaintiff succeeds in recovering from the defendant an amount which carries costs [that is, the £31 10s.], even though it is less than the sum paid into court, he succeeds on the first of those issues, and is entitled to the whole costs of the action down to payment in, and the subsequent costs of the issue on which he has succeeded. The above statement of the practice was read and adopted in the judgments given in *Powell v. Vickers & Co.* (1).

H In this case, on the eve of trial the defendant pays this money into court. The plaintiff proceeds to trial, and the first issue to be tried here, applying the language of COLLINS, M.R., in *Powell's* case (1), at p. 75, was the issue of trespass, and the second, given trespass, as to whether the payment into court was sufficient. The plaintiff is entitled to all the costs of the action down to payment in, and to the costs of the issue of trespass until that issue was decided.

Morton, K.C.: The principles applied in *Powell's* case (1) are not applicable to-day. When that case was decided there was in existence a code which laid down certain rules as to the costs, including R.S.C., Ord. 22, r. 6 (c), which provides:

... A plaintiff who does not accept money paid into court shall not be allowed his costs of the issues as to liability unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in.

That rule is no longer in existence. The situation is entirely different to-day. Now the judge has a complete discretion.

CLAUSON, J.: In this case there are two issues: the issue of trespass and the issue of damage. The issue of trespass was a rather important one. Even if the action had resulted in nothing but nominal damages, the action might well have been one which the plaintiff was justified in bringing. It is quite true that as the rule now stands I am given a wider discretion as to costs, in a case where money has been paid into court with a denial of liability, than the court may have had before the rule was altered; but I think in the present case the right order to make is as follows. I had determined, and I so stated when I gave my judgment before I knew of the payment in, that the costs were to be High Court costs, so that throughout this order when I say "costs" I mean High Court costs. Tax the plaintiff's costs on the High Court scale up to payment in, and subsequent costs of the issue of trespass, and order the defendant to pay the costs so taxed. Tax the defendant's costs since payment in of the issue as to damages, again on the High Court scale, and order plaintiff to pay them. In taxing these costs, the taxing master is to apportion the general costs of the action between the two issues. The costs ordered to be paid are ordered to be set off. £31 10s. to be paid out of the fund in court to the plaintiff. In case there is a balance of costs in favour of the plaintiff, pay the fund in court *pro tanto* to the plaintiff in discharge of that balance, and should there still, after such payment, be a balance due to the plaintiff, order the defendant to pay it. In case there is a balance of costs due to the defendant, order the plaintiff to pay such balance of costs, and also order the balance of the fund in court to be paid out to the defendant.

Solicitors: *Lipton & Jefferies*, agents for *Finklestone & Sandler*, Manchester (for the plaintiff); *Nash, Field & Co.*, agents for *H. W. G. Garnett, Crewe* (for the defendant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re LEWIS'S WILL TRUSTS, O'SULLIVAN v. ROBBINS.

[CHANCERY DIVISION (Bennett, J.), November 19, 20, 1936.]

Will—Construction—“Securities or investments representing the same if they have been converted into other holdings”—Redeemable stock—Redeemed—Redemption moneys placed on deposit—Ademption.

A

A testator by his will bequeathed to his trustee upon trust for the testator's cousin “the following securities (or the investments representing the same at the date of my death if they have been converted into other holdings) . . . and £2,000 4 per cent. mortgage debenture redeemable stock of A.E.I., Ltd.” In 1935 this stock was redeemed and the redemption moneys amounting to some £2,200 were credited to the testator's current account at his bank. There was already standing to the credit of this account some £300. The sum of £400 was at the testator's request transferred to the testator's deposit account, and £2,000 was deposited with A. & N. S., Ltd., at varying rates of interest. The testator died in 1936 :—

B

C

HELD : the bequest of the £2,000 4 per cent. stock had not been adeemed, the money on deposit with the bank and with A. & N. S., Ltd. were investments which at the date of the testator's death represented the stock, and these moneys on deposit passed under the bequest. Money on deposit may be treated as an “investment.”

D

[EDITORIAL NOTE.] It would seem that the parenthesis in the will was intended to provide for the redemption of the stock, but possibly draftsmen with this case before them will be inclined to use a more appropriate term. The meaning given to the word “investment” here is certainly a wide one, and upon this point the case must be used with care, because it is clear that this part of the decision is based upon the special facts of the case.

E

AS TO ADEPTION, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 602, 603, paras. 1180, 1181; and FOR CASES, see DIGEST, Vol. 44, pp. 409-412, Nos. 2405-2427.]

Cases referred to :

- (1) *Re Price, Price v. Newton*, [1905] 2 Ch. 55; 44 Digest 729, 5831.
- (2) *Manton v. Tabois* (1885), 30 Ch. D. 92; 44 Digest 710, 5545.
- (3) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 12 Digest 483, 3961.

F

ADJOURNED SUMMONS for the determination of the question whether upon the true construction of the will dated Mar. 7, 1932, of Frederick Lewis, who died on Feb. 22, 1936, and in the events which had happened, the bequest therein contained to the trustee thereof of £2,000 4 per cent. mortgage debenture redeemable stock of Associated Electrical Industries,

G

Ltd., had been adeemed or took effect in regard to and operated so as to pass any and if so what part of the testator's estate. The relevant clause, which was cl. 4, of the will is set out in the judgment herein, as are also the events, upon which it was alleged on behalf of those persons interested as residuary legatees under the testator's will and as his next of kin,

H

that ademption had taken place.

E. Riviere for the plaintiff, the trustee of the testator's will, stated the facts.

M. R. C. Overton for the first defendant, Mrs. Robbins.

R. H. Prendergast for the second defendants, residuary legatees.

Hon. Denys Buckley for the last defendant, one of the testator's next of kin.

Prendergast: The £400 and £2,000 on deposit respectively in the testator's bank and the Army and Navy Stores, Ltd., are not investments, since the testator took the proceeds of the redemption and mixed them with his own money in his current account: see *JARMAN ON WILLS*, 7th Edn., Vol. II, p. 1273. A

BENNETT, J.: If he had put out these moneys on mortgage, that would have been an investment. What is the difference between such a transaction, which is simply a loan on the security of a deed, and lending money to a banker? B

Prendergast: It has been held that putting money into a deposit account is not investing it, but waiting to invest it: see *Manton v. Tabois* (2). Nowhere has it been held that money on deposit is an investment. C

BENNETT, J.: Has it ever been held that money on deposit is not an investment?

Prendergast: See *Re Price*, *Price v. Newton* (1), at p. 58, and the present case is stronger than *Re Price* (1). Moreover, there are many cases in which the word "money" has been held to include a deposit account, which shows that the tendency of the court is to treat deposits as money rather than as investments. D

Buckley: I am in the same interest as *Prendergast*, and adopt his argument that these deposits do not constitute investments. When the proceeds of the redemption of these debentures were paid into the testator's current account, there were other moneys in it, and, according to the rule in *Clayton's Case* (3), when the testator took the £400 out of that account to place it on deposit, he must be taken to have drawn partly from the money already there and partly from the proceeds of the redemption of the debentures. That being so, it would be going rather far to attempt to say which part of the sum placed on deposit represented the proceeds of the redemption of the debentures and which part represented the other moneys of the testator. Nor is there any difference between money placed on deposit at the bank and at the Army and Navy Stores, Ltd. They were both moneys capable of being withdrawn on the giving of notice, on which interest was paid. The fact that interest is paid is shown by *Re Price* (1) not to be enough to constitute an investment, and the fact that the person with whom the deposit is made is not a bank but a trading company can make no difference. E F G

I say also that the *prima facie* meaning of the word "conversion" in connection with investments connotes a change in an investment made, not by the owner of the investment, but by the undertaking or the government which issues the stock. If that is the meaning of conversion, it becomes necessary to decide whether this legacy is general or H

specific. If it is a general legacy, it will fail, because it is now impossible to ascertain what would be the amount of money which would purchase the amount of the debentures which were given to the legatee. If it is a specific legacy it fails because what has happened is not a conversion within the meaning of that word as used in the parenthesis in cl. 4.

A *Overton*: The word "investment" is not one which has any fixed meaning: see FARWELL, J., in *Re Price* (1), at p. 59. But it is not necessary in this case to consider its meaning *in vacuo*, as there is a context in relation to which it should be considered. It is clear from the words in parenthesis in cl. 4 that the draftsman of the will was using the words "other holdings" as equivalent to investments. Otherwise those words do not make sense. And money on deposit is clearly a holding. Thus it is not necessary to give a definition of the word "investment," but even if it were, it would be quite justifiable to hold that it covered this deposit in the Army and Navy Stores, Ltd. There is a clear distinction between money placed on deposit with a banker and that placed with something like the Army and Navy Stores, Ltd., or the Post Office Savings Bank or a building society. But it is common parlance to use the word investment in connection with the two latter.

B I say that the legacy in this clause is specific. This is suggested by the use of the words, "the following securities" which the testator held at the date of his death. But even if it were to be held that the legacy is a general one, then, although the executors cannot get the specified investment directly, they can find out what now represents it, which is **E** £2,200 cash, because the debentures of the series in question have all been redeemed.

As to the meaning of the word "conversion," the words in parenthesis are exactly apt to cover such a contingency as has happened. This is not a case where the testator has redeemed, but where the company has **F** said it was going to, which is the same thing as the company saying it will either redeem or give the testator an equivalent amount of debentures carrying a lower rate of interest. If the testator had exercised his option and taken cash, it could not be said that that was not a conversion.

G BENNETT, J.: The clause in the will which has to be dealt with in the present case is as follows:

I bequeath the following securities (or the investments representing the same at the date of my death if they have been converted into other holdings), namely . . . and £2,000 4 per cent. mortgage debenture redeemable stock of Associated Electrical Industries, Ltd., to my trustee upon trust to pay the income therefrom to my cousin Mrs. Essie Robbins, formerly Essie Allen, for her life.

H On the death of Mrs. Robbins, the testator directed that the said security or investment should fall into and form part of his residuary estate.

On July 19, 1935, the £2,000 4 per cent. mortgage debenture redeemable

stock of the Associated Electrical Industries, Ltd., was redeemed, and the redemption moneys, amounting to £2,200 in respect of the principal and £2 0s. 9d. in respect of interest, were on the same date credited to the testator's current account at Lloyds Bank, Ltd. At the date of such credit there was already standing to the credit of the testator's said account the sum of £314 4s. 3d., and the sum of £400 was, at the request of the testator, transferred from such current account to the testator's deposit account at the said bank, and, as appears from three deposit receipts given by the Army and Navy Stores, Ltd., on July 22, 1935, £2,000 was deposited by the testator with the Army and Navy Stores, Ltd., of which £1,000 was deposited at 3 per cent. per annum and was withdrawable on 6 months' notice, £500 at $2\frac{3}{4}$ per cent. per annum, and withdrawable on 3 months' notice, and £500 at $2\frac{1}{2}$ per cent. per annum and withdrawable on 1 month's notice. A B

The question asked is whether, on the true construction of the will and in the events which have happened, the bequest therein contained of £2,000 4 per cent. mortgage debenture redeemable stock of Associated Electrical Industries, Ltd., has been adeemed, or takes effect with regard to and operates so as to pass any and if so what part of the testator's estate. In my judgment the bequest has not been adeemed. Upon the true construction of the clause in question, the words in parenthesis with regard to "investments representing the same at the date of my death if they have been converted into other holdings" were inserted with the intention of preventing ademption. The question really is whether the money placed by the testator on deposit can be regarded either as an investment or a holding within the meaning of the clause. There is no express authority which binds me to decide that money on deposit is not an investment. A case such as *Re Price* (1) turned entirely upon the context in which the words "pecuniary investments" happened in that will to be placed. Money invested can, I think, in accordance with popular parlance be understood to mean money placed on deposit, certainly money placed on deposit with such a company as the Army and Navy Stores, and I have no hesitation in holding that the sum of the £400 deposited with Lloyds Bank and the £2,000 deposited with the Army and Navy Stores, Ltd., were investments which at the date of the testator's death represented the £2,000 4 per cent. mortgage debenture redeemable stock of Associated Electrical Industries, Ltd., and that these moneys on deposit pass under the bequest. C D E F G

Solicitors : *Tyrrell Lewis & Co.* (for all parties).

[Reported by C. M. YOUNG, Barrister-at-Law.] H

MERCANTILE BANK OF INDIA, LTD. v. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, AND STRAUSS & CO., LTD. (in Liquidation).

A CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA v. MERCANTILE BANK OF INDIA, LTD., AND STRAUSS & CO., LTD. (in Liquidation).

[KING'S BENCH DIVISION (Porter, J.), **December 14, 15, 16, 17, 1936.**]

Companies—Power to borrow—General power in memorandum of association —Power given to directors in articles of association—Delegation of borrowing power by company—Validity—Ostensible authority—Letter of hypothecation —Charge on produce in go-downs—Produce in go-downs fluctuating—Floating charge—Unregistered charges—Effect of seizure before liquidation.

A trading company was by its memorandum of association empowered, *inter alia*, to raise capital and to borrow money by deeds of hypothecation, and to act through agents. The only reference to borrowing contained in the articles of association was a provision that the directors might borrow money. There was no express power of delegation by the directors. By various powers of attorney, the company appointed agents, not directors, who were empowered, *inter alia*, to borrow money on the security of the company's goods, railway receipts, bills of lading or other documents of title. These agents borrowed money principally upon the security of letters of hypothecation relating to goods and produce in the company's go-downs. The company was free to deal with the goods and produce in the ordinary course of business, and the contents of the go-downs therefore changed frequently. In some of the printed forms of letter of hypothecation the spaces for the names of the places at which the go-downs were situated were left blank, and at the end of the form, after the signature, a list of places was set out. One of the company's agents borrowed sums in excess of the value of the goods. A bank which held certain letters of hypothecation, acting upon a licence to seize contained in letters from the company, seized all the goods to which it had access by the terms of such letters of hypothecation :—

HELD : (i) the fact that the articles of association empowered the directors to borrow, did not restrict the company's general power to borrow, which it could exercise through properly authorised agents.

(ii) in the absence of anything in the memorandum or articles of association restricting the company's power to borrow through agents, borrowing by such agents was within their ostensible authority, the precise limits of the agents' power to borrow being a matter of internal management into which a lender would not be required to inquire. The company was, therefore, bound even by the excessive borrowings of the appointed agents, so long as those borrowings were within the ostensible authority of the agents.

(iii) the letters of hypothecation constituted floating charges, which ought to have been registered, but upon seizure, before the liquidation of the company, under the licence to seize, a specific charge came into being, which had been perfected by the seizure of the goods. The seizure was, therefore, in the circumstances a rightful one, and valid against the liquidator.

(iv) the produce which could be seized under the letters of hypothecation, in which the spaces were left blank, was limited to produce in the go-downs specified at the end of the form.

[EDITORIAL NOTE.] This case is one of considerable interest as a commercial case and also of legal importance since the judgment includes a discussion of the delegation of the borrowing powers of a company. Though the articles of a company may give the directors borrowing powers, unless those powers are exclusive, the company itself may still, by the execution of a power of attorney, delegate its borrowing powers to an agent. Those dealing with the company are entitled to assume that the necessary resolution by the company has been passed at a general meeting. It would be otherwise if the power of attorney was given by the directors, unless they had been given a special power to delegate. A

AS TO DELEGATION BY COMPANIES AND THEIR DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 412, 413, paras. 678-683, and pp. 317, 318, para. 532; and FOR CASES, see Digest, Vol. 9, pp. 620, 621, Nos. 4124-4130, and p. 481, Nos. 3151-3158.] B

Cases referred to :

- (1) *Mahony v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 9 Digest 642, 4239.
- (2) *Re County Life Assurance Co.* (1870), 5 Ch. App. 288; 9 Digest 629, 4167. C
- (3) *Houghton & Co. v. Nothard, Lowe & Wills*, [1927] 1 K.B. 246; Digest Supp.
- (4) *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979; 10 Digest 752, 4698.
- (5) *Re Toomer, Ex p. Blaiberg* (1883), 23 Ch. D. 254; 7 Digest 108, 647.
- (6) *Wrightson v. McArthur & Hutchisons*, [1921] 2 K.B. 807; Digest Supp.
- (7) *Illingworth v. Houldsworth*, [1904] A.C. 355; 10 Digest 750, 4690. D
- (8) *National Provincial Bank of England, Ltd. v. United Electric Theatres, Ltd.*, [1916] 1 Ch. 132; 10 Digest 751, 4697.
- (9) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 9 Digest 615, 4094.
- (10) *Morris v. Delobel-Filipo*, [1892] 2 Ch. 352; 7 Digest 19, 82.
- (11) *Governments Stock & other Securities Investment Co. v. Manila Ry. Co.*, [1897] A.C. 81; 10 Digest 761, 4758. E
- (12) *British India Steam Navigation Co. v. Inland Revenue Comrs.* (1881), 7 Q.B.D. 165; 6 Digest 500, 3172.
- (13) *Edmonds v. Blaina Furnaces Co., Beesley v. Blaina Furnaces Co.* (1887), 36 Ch. D. 215; 7 Digest 31, 155.
- (14) *Levy v. Abercorris Slate & Slab Co.* (1887), 37 Ch. D. 260; 7 Digest 31, 156. F

ACTION by the Mercantile Bank of India, Ltd., against the Chartered Bank of India, Australia and China for the delivery up of certain goods and for damages for their detention and for conversion; and against the defendants Strauss & Co., Ltd., and the defendant bank for a declaration that the plaintiff bank was entitled to possession of the said goods by reason of a certain instrument of hypothecation and by certain letters of lien and letters of guarantee. By counterclaim the defendant bank sought against the plaintiff bank and the company a declaration that the defendant bank was entitled to seize and hold the goods in question by virtue of certain similar documents. Each of the banks alleged against the other that the instruments relied upon were void for non-registration, and non-registration was admitted. By its defence the company alleged that the execution of the various instruments was *ultra vires* the company; also that the instruments G
H

were signed by an agent in excess of his authority ; and that they were void for non-registration.

By agreement between the parties, the judge was asked to decide certain particular issues. It was admitted that Strauss & Co., Ltd.,
A a firm of East India produce merchants (whose memorandum and articles of association appear sufficiently from the judgment) had appointed agents to manage the business in India and that these agents, or one of them, purporting to act under these powers of appointment, had pledged the produce of the company against loans from both the
B plaintiff and the defendant banks, issuing to the banks letters of hypothecation, letters of lien and letters of guarantee. One of the agents borrowed more than the value of the goods subsequently appeared to warrant, and later committed suicide. At that time and immediately before the company went into liquidation, the defendant bank, acting
C on a licence to seize contained in letters from the company, seized all the goods it had access to under the terms of its various instruments. These goods constituted in effect all the available assets of the company.

Sir William Jowitt, K.C., Cecil W. Turner and C. P. Harvey, for the plaintiff bank, referred to *Illingworth v. Houldsworth* (7), *National Provincial Bank of England, Ltd. v. United Electric Theatres, Ltd.* (8) and *Royal British Bank v. Turquand* (9).

H. U. Willink, K.C., and H. G. Robertson, for the defendant bank, referred to *Evans v. Rival Granite Quarries, Ltd.* (4), *Morris v. Delobel-Flipo* (10), *Wrightson v. McArthur & Hutchisons* (6), *ReToomer, Ex p. Blaiberg* (5), and GORE BROWNE ON COMPANIES, 38th Edn., p. 315.

H. Wynn Parry, K.C., and J. P. Ashworth, for the company, referred to *Houghton & Co. v. Nothard, Lowe & Wills* (3), *Governments Stock & other Securities Investment Co. v. Manila Ry. Co.* (11), *Evans v. Rival Granite Quarries, Ltd.* (4), *British India Steam Navigation Co. v. Inland Revenue Comrs.* (12), *Edmonds v. Blaina Furnaces Co.* (13), *Levy v. Abercorris Slate & Slab Co.* (14).

PORTER, J. : This is an action brought by the Mercantile Bank of India, Ltd., against two parties : the Chartered Bank of India, Australia
G and China, and Strauss & Co., Ltd. It arises in this way. Both the Mercantile Bank of India, which is a bank whose head office I think is in this country, but which carries on business in India, and the Chartered Bank of India, Australia and China, another bank whose head office is in this country, but carries on business in India, among other
H places, had lent money to Strauss & Co., Ltd., upon the security, or alleged security, of certain property or goods of Strauss & Co., Ltd. Both of them had been dealing with Strauss & Co., Ltd., for some considerable period. Both of them had advanced large sums of money from time to time. There were outstanding at the date which is the

material date, January of last year, considerable sums to both banks.

The difficulty arises in this way: At the beginning of last year Strauss & Co., Ltd., got into difficulties; and ultimately that company went into liquidation. Thereupon, and indeed before that, the banks were minded to take advantage of the securities which they said had been pledged to them, and to reap the fruits of being secured creditors. The dispute is partly between the two banks and partly because the plaintiff bank, the Mercantile Bank of India, claims that it is entitled to call on most of the property of Messrs. Strauss in India, whereas the defendant bank, the Chartered Bank of India, makes the same claim on its behalf; and partly it is a dispute between both the banks and Strauss & Co., Ltd., the latter saying that no claim can be made by the banks upon the documents which they gave, because those documents created floating charges, and the floating charges were never registered. That is putting it very roughly, because there is a considerable modification in respect of the case of one of the banks in respect of the matter. But Strauss & Co., Ltd., say further, which is perhaps the most important part of the dispute from their point of view, that the loans, perhaps, and the pledging certainly, are *ultra vires* the company; and that, therefore, the banks, so far as the loans are concerned, are merely entitled to prove in respect of any money they found used for the legitimate purposes of the company, and in respect of which the plaintiff bank cannot recover at all.

That being the class of dispute, one ought to state a few more facts. The security of the Mercantile Bank, the plaintiffs, is claimed to be contained in three documents, which are Nos. 2, 3 and 4. Two of them have been called "letters of hypothecation," and as between those two I need not distinguish: they are practically in the same terms. The third set of documents, which is contained in the fourth bundle, are called "letters of lien." In my view, so far as any question of floating securities is concerned, they do not differ from Nos. 2 and 3. Therefore, so far as the Mercantile Bank of India is concerned, and so far as those documents are concerned, what I have to determine first of all is whether the Mercantile Bank of India is entitled to seize the property, or whether it is precluded from doing so on the ground that the two documents of hypothecation, documents Nos. 2 and 3, are floating charges or debentures, and so require registration, or whether they are not. When I have decided that, in my view I have decided also the position with regard to document 4. I think it comes within the same class, it is in the same position, and is open to the same objections as may apply to Nos. 2 and 3, the objection being that it is a floating charge or debenture which has not been registered, and therefore cannot be relied upon as against anybody except the company itself. The claim of the Chartered Bank is a claim upon documents which I think are contained in bundles 8 and 6.

I put them in that order because No. 8 are the letters of hypothecation, and No. 6 are what have been called "trust receipts." So far as those two documents are concerned, the position of the Chartered Bank differs in two respects from that of the Mercantile Bank. It differs,

A first of all, because the Chartered Bank not only had the document of hypothecation, document 8, but also it had seized the goods before the company went into liquidation, and before the liquidator was appointed. It is said thereby that it had made what is a floating charge into what is an actual specific charge, and therefore it was entitled

B to hold the goods which it had sold, or which it had taken. Document 8 differs also from the documents of the Mercantile Bank in that it is said that it really was itself a specific and not a floating charge. I will come to the documents in a moment. I do not propose finally to decide that question, because I think it is admitted, at any rate by Mr. Wynn Parry,

C there being no making of an admission by Sir William Jowitt (and I have not really heard any argument to the contrary), that, the goods having been seized, the Chartered Bank has put itself in a different position ; and has brought down, as it were, on the floating charge a perfecting of the charge upon those goods, whatever they may be, which are included

D under that document 8, and which in pursuance of document 8 it has seized. That is the kind of dispute which arises with regard to that matter.

The other matter that I shall have to deal with is the question of *ultra vires*. While proposing to deal with that separately, I may say

E at once that I do not propose to decide the question of whether any of the documents are debentures or not ; because I think I can determine this case without determining that matter ; and I do not propose to determine any matters which may require a good deal of consideration, and which may give rise to future disputes, when it is not necessary

F for the conclusion of the case to make that determination.

I think those are all the points on the documents, except one which Sir William Jowitt asked me to reserve ; and that is the possibility on his documents of a claim he thinks he may have against the Chartered Bank : a claim which may arise because the Chartered Bank seized all

G the goods in the go-downs in India—I am speaking roughly when I say that. There are some which are not included, but it is substantially all the goods in go-downs in India, whereas the Mercantile Bank says it was only entitled under its document to seize those in certain of the go-downs. As to the other go-downs, Sir William Jowitt says : "I

H could have seized in due time to make my charge effective by means of seizure and thereby perfect it, and therefore, to defeat the claim of the other party." He says : "I could have insisted upon it if you, the Chartered Bank, had not previously wrongly seized certain goods, upon which I had a floating charge, though it might not have been effective

against the creditors or liquidator. But at the time when I could have seized, the creditors and liquidator were not yet in a position to resist my claim."

Those are the disputes which I have to determine. I propose first of all to deal with the question of whether the borrowing, and more particularly whether the pledging or hypothecation, if one may so call it, was *ultra vires* the company or not. The position with regard to that was, that in the original defence it was simply said it was *ultra vires* the company. That was amplified by certain particulars, and I propose to deal with the case upon the particulars which amplify that main contention. The decision of the point depends on two matters: it depends upon the construction of the memorandum and articles of association, and it depends to some extent upon the documents passing at the time; it also depends upon the true effect of the power of attorney which was given by Messrs. Strauss to Mr. Whitehouse for use in India. Now, the memorandum and articles provide first of all in general that Messrs. Strauss are to deal in grain. That is all I need say about it, because it is quite plain from the memorandum that Messrs. Strauss were a trading company, and, as such, in the normal course would be entitled to borrow, and give security for their borrowing. That is contained in art. 3 of the memorandum of association. Express power, apart from implied power to pledge, is given under art. 5 of the memorandum, and art. 16 of the memorandum which gives power to raise capital and borrow money by deeds of hypothecation or obligation of the company, and so on. Art. 17 gives a general power, and art. 18 makes each of the objects a separate object. So much for the memorandum. If there was no question on the articles, in my view it is plain that the company would have the right to borrow and to pledge, and that they can do that either through themselves or through an agent properly appointed. There is a provision, I think, with regard to acting through agents. At any rate, they have power to do things through agents by art. 15 of the memorandum. In my view, if the matter rested there, there would be power for the company to appoint agents, and through those agents to borrow money and raise capital on company matters, which must be done in some way through some agent of the company. The company as an entity cannot act except through some agent; and I see no reason why it would be improper for it under that memorandum to appoint any agent it chose, giving a power of attorney for that purpose. Actually what it did was to appoint a Mr. Whitehouse for this purpose its attorney to borrow and to pledge. That power of attorney gave power:

3. To operate upon existing or open new accounts with any private or government banks in India in the name of the company, and to deposit and withdraw money deposited with such banks.

4. To pledge with all or any such banks, goods and/or railway receipts and/or

bills of lading and/or other documents of title as security for money which it may be necessary for the attorney to borrow in connection with business transacted by him as aforesaid—

A in pursuance of authority given to him. So far, as I say, if the powers of the company had been those contained in the memorandum only, no question in my view could have arisen : any borrowing and pledging by Mr. Whitehouse would have been authorised and justified, and no question would arise. There are other reasons, which I will come to later, why I think that is so ; but those are sufficient for the present.

B But it is said that, though that is so, the powers which are given in the articles to borrow are powers that are limited to the directors, and, therefore, as the articles must be considered as a whole, as well as the memorandum, the general power given by the memorandum is limited by the powers given under the articles, and is confined to the directors.

C The article to which I may refer is art. 74. I do not refer to the others, because I am anxious not to stray more than is necessary in giving my judgment. Art. 74 is :

D The directors may at any time, at their discretion borrow or raise for the purposes of the company [from anybody, I suppose] and on such terms and conditions as the directors may think proper, and they may secure payment of such money in such manner and on such terms and conditions, and on such security, if any, as the directors determine, and in particular by the issue of debentures or debenture stock—

and so on. It is said that limits the power of borrowing and the power of giving security to the directors. It is said that that is so because of the principle that the directors have not been given express power to delegate : *delegatus non potest delegare*. It is said, if you look at the articles themselves, you will see that the directors were not intended to delegate that power, because where it is intended that the directors may have power to delegate, that is expressly provided for. One of the powers, which I may give as an instance, being the power to appoint a managing director, who can or shall have all the powers of the directors, is contained in art. 80. That is how it is said that the matter is *ultra vires*. Perhaps I may put it a little more exactly in this way. It is said that parties dealing with companies must be taken to have notice of both the memorandum and articles of association, and to be bound by all the limitations of authority contained in them. If, then, an authority to borrow, or to give security, is entrusted only to the directors, no one can lend to or take securities from the company, except by or through the authority, or the apparent authority, of the directors. For that the case of *Mahony v. East Holyford Mining Co.* (1) is quoted, and I do not wish to weaken that authority. Stated in those terms, I think that is undoubtedly the law. I would add the words “apparent authority” because, though authority may not have been in fact given, yet if the borrowing or giving of securities is done by a person who might have authority, provided a resolution of the company

directors had been passed, or other internal act of the company had been done, the lender, the holder of the securities, is entitled to assume that that resolution has been passed, or that act done properly, and to rely upon the apparent authority of the person borrowing the money or giving the security, at any rate providing he knows of, and in fact has relied upon, the authority given. For the proposition down to that last sentence, the case quoted is *Re County Life Assurance Co.* (2), at p. 293. I limit it to provided he knows, because of some observations by SARGANT, L.J., in *Houghton & Co. v. Nothard, Lowe & Wills* (3). In the present case it is said that though, no doubt, the directors might have passed a resolution to borrow and give security, yet the banks knew that that was not so, because what the company acted upon, and acted upon with the banks' knowledge, it is said, is the power of attorney which was shown to them. It is said that power of attorney made it plain that the borrowing and giving of security was not done by any act or resolution of the directors, but was done in accordance with the authority given by the power of attorney, and without any other ground, supported by what would be authority to borrow, namely, the determination of the directors themselves. That is the proposition which is put on behalf of the liquidator acting on behalf of the company. The general principle, at any rate, which is sound, is that the authority and acts of the agent are limited by the memorandum and articles of association. Perhaps one may put it in this way. A person dealing with a company is entitled to accept the apparent authority of anyone with whom he deals who has an apparent authority given by the company, but, when considering whether a person has apparent authority or not, one of the matters which he is supposed to know and have in mind is the memorandum and articles, and, therefore, if apart from the memorandum and articles the person with whom he is dealing has apparent authority, he would be entitled to act upon it; yet, if by looking at the memorandum and articles he finds that that authority is limited and has not been given to the person concerned, then the person who is dealing with the company has knowledge of that limitation and cannot rely on the apparent authority of that person. Having regard to these principles, was the borrowing *ultra vires* the company? The argument the other way has been put more or less in this form. A trading company has the power to borrow and give security. Therefore, *prima facie*, anyone holding a company's power of attorney, if that power of attorney gives power to borrow and to give security, has apparent authority so to do, and the bank can safely act with the person borrowing, and in this case can safely act on that apparent authority. If I may say this in passing here, that gets rid of any difficulty such as occurred in *Houghton & Co. v. Nothard, Lowe & Wills* (3), where there was no apparent authority at all, apart from the memorandum and articles. Here there is apparent

authority, apart from the articles and memorandum, and the only question is : Has that apparent authority been limited ? In *Houghton & Co. v. Nothard, Lowe & Wills* (3) the question was not : Had the authority been limited, because the authority had been given. Here

A the banks could safely act upon that apparent authority, unless somewhere in the memorandum and articles that apparent authority was taken away. Now, with regard to that, the argument is put, in the first place, that the authority was not taken away by the articles. It is not forbidden that the company should borrow except through the

B directors ; it is only that part of the power given to the directors is that they may borrow. There is no statement in the articles, or in the memorandum, that the company shall borrow only through its directors. No doubt the directors would be the normal persons to do so, but the power is permissive, and it is not merely given to them and to no others.

C Then, say the banks, the power of attorney does not purport to be the act of the directors ; it is the act of the company. If it had purported to be the act of the directors, it might have been *ultra vires* because of the principle *delegatus non potest delegare* ; but, say the banks, the company, apart from the directors, can act in general meeting or other-

D wise. In general meeting, I suppose, it could give such a power, and if it is possible that such a power could be given in general meeting, then those who see the power of attorney, and to whom the power of attorney is given, are entitled to assume that the power of attorney has been given by somebody who effectively can give it and to rely upon

E it. That is one of the arguments, at least as I understand it, made on behalf of the banks. They say it is a question of internal management. Internally the company could have given a power of attorney to this person to do these things. He is not prevented from so doing by its articles, which also give power to the directors. Not having so limited

F itself, as the matter could be done by resolution of the company, and as the banks are not obliged to know of the internal acts of the company, they are entitled to think that this particular power of attorney is validly given. I myself propose to give effect to that argument.

But there are, I think, other arguments to be made on behalf of the

G company. It is true that the power of attorney gave certain powers to Mr. Whitehouse, and it is alleged that those powers are the only powers that could have been acted upon. I do not take that view. I think that the directors might quite well have made a general resolution with regard to borrowing up to a certain amount, or up to a less amount,

H and could have given general authority for the pledging of documents up to a certain limited amount, or not up to the limited amount, and might have left the arranging of the details to the gentleman holding the power of attorney. In that case, in my view, that would have been an internal arrangement which the banks would not have been obliged to know about,

and the banks might rely upon the power of attorney being exercised in that way. But that that is not pure speculation is to be seen by the letters which Sir William Jowitt has quoted. They start with a letter to the Mercantile Bank of India from Messrs. Strauss & Company of Mar. 31, 1926 :

Please find herewith guarantee for credit facilities duly signed and counter-signed by Strauss & Co. We should be much obliged if you would to-day cable your friends in Karachi informing them that this credit has been opened. If convenient to you, we would ask you to cable to Karachi and not Bombay as our chief manager is at Karachi, and we propose cabling him to-day as to the use which he may make of these facilities.

That shows the company is arranging the loan, borrowing in England, and, if I follow it aright, not only borrowing, but determining the amount of the overdraft it was going to borrow in England, but leaving a certain amount of detail to be arranged from time to time by the person holding its power of attorney. But one gets it even more carefully stated, and one gets the further question of borrowing as against security dealt with, when one comes to a letter from the Mercantile Bank of India to Strauss & Co., Ltd., dated June 10, 1930 :

With reference to Mr. Lessing's call on Friday last, we shall be glad to authorise our Karachi manager to make advances up to 10 lacs of rupees against letters of lien over wheat in your go-downs in Karachi, these advances to be repaid by delivery of documentary demand and/or three months sight D.P. bills on London. We shall be glad to hear from you that this arrangement meets with your requirements so that we may advise Karachi to the above effect.

That is indicative to me of what was happening then : that the general arrangement for borrowing and giving security was being made in England, leaving the particular details in the hands of the gentleman holding the power of attorney, but not leaving it to him to make the whole arrangement, himself arranging the borrowing and himself arranging the pledging without specific authority from the directors as to whether he should do so. On those two grounds I think that the claim that the action of the company was *ultra vires* does not prevail.

The next question which arises is whether the documents of the Mercantile Bank of India, documents 2, 3 and 4, are floating charges, or whether they are not. It is quite true that a floating charge is not a term of art ; but it is constantly used and is now a well known phrase. In my view, documents 2, 3 and 4 of the Mercantile Bank of India are floating charges. I say nothing as to whether they are debentures. I said I would not because that is a problem which may require more careful consideration than I have been able to give it, and it may arise in some other matter. It is sufficient in this case to say that, in my view, they are floating charges. It is quite true that, in one case, on the question of restraint the phrase "restraint upon dealing with the goods" was used as being one element in determining whether there was a floating charge or not ; but it is equally plain that there may

be matters of restraint which may still leave the document a floating charge. An instance which was given was the promise contained in the charge that no other charge, either equal or superior, should be given. That is as simple an illustration as any. That would still be a floating charge. But when one comes to the question of what a floating charge is, in my view, one gets the best description from what was said by a learned Lord Justice. I will not say "definition," because one learned Lord of Appeal said he need not define the meaning of the phrase, and a learned Lord Justice, whose definition I propose to adopt, said, to start with: "It is not difficult to define a floating charge," and then proceeded to give what I should have considered a definition if he did not afterwards himself refer to it as a description. In these circumstances, I prefer the description of FLETCHER MOULTON, L.J., which is contained in *Evans v. Rival Granite Quarries, Ltd.* (4), at p. 994. I think that case in effect says, without limiting or trying to be too exact in the matter, that the main and substantial question is: Are you altering from time to time the security which you have given so as to leave that security free for the person making the pledge to deal with, or are you not leaving it free, but are you restraining him from dealing with it in the sense that he has either got to pay the money for which the pledge was given as security to him, or on his behalf, or in the sense that it actually is made his property for the time being though when it is parted with the money may be substituted for the security given. In my view, in the case of the Mercantile Bank of India, Strauss & Co., Ltd., were entirely at liberty to deal with the goods which were pledged, subject to there being a general charge over the property which did not light upon any of their property until the seizure of the goods. So much for the question concerning the documents of the Mercantile Bank of India.

Next we come to the documents of the Chartered Bank of India. Here I do not propose to determine whether the document of the Chartered Bank was a specific, or a floating, security. Again, it does not seem to me to be necessary to do so, and, indeed, it is as well not to go outside what is necessary for the determination of the particular case. The authorities begin with GORE BROWNE ON COMPANIES, 38th Edn., p. 315, and the cases of *Re Toomer, Ex p. Blaiberg* (5) and *Wrightson v. McArthur & Hutchisons* (6). On the authority of those cases, it appears that once seizure has taken place, at a time before liquidation, at any rate, of the company, the security, even if it were originally a floating security, has ceased to be so describable. It has become a definite charge which has been perfected by the seizure of the goods. Therefore, in so far as the Chartered Bank has seized the goods right-fully, it is entitled, in my view, to the benefit of its security.

That brings one to the third question, and that is what the Chartered Bank was entitled to seize. That is a pure question of construction,

as I follow it, of the document. I will make some observations in addition to dealing with the construction of the document afterwards, but for the moment I propose to confine myself to the construction of the document. I am against Mr. Willink's contention. I think that the document means that the particular party, the Chartered Bank of India, A is entitled to seize these goods in this warehouse, but it is only on the power on the back of the letter of hypothecation. Without going through the form of document, one may say that the question arises in this way. The document is apparently intended to be used so as to show security given on produce at particular warehouses and B go-downs which it is intended should have been inserted in the body of the document. In this particular case, no go-downs have been inserted. It would, of course, have been easy to put in particular go-downs if particular go-downs had been intended, or to have said, "any go-downs whatever," or, "any of our go-downs," if that again had been intended. C I should rather myself have expected "any of our go-downs whatsoever," or some phrase like that, if the form had been fully filled up, but most commercial documents are not always very accurately filled up, and one must not lay too much stress on that. But they have left in throughout the word "at." I am bound to say I find great difficulty D in construing a document which charges goods which may from time to time be in, or which may from time to time be brought in, to "any of our go-downs at" (blank), or be in transit. There would be difficulty in construing that, even if it simply stood there and there was nothing filled in the blank. But I think the matter is solved when one looks E at the back and looks at the last words, it is quite true, after the signature, where one finds the words "go-downs situated at" particular places specified, and in this case "grain at Bombay and/or Mormugoa and/or Madras and/or Coconada and/or Vizapatam." When you find the word "at" used in the body of the document and you find "go-downs F situated at" particular places at the end, in my view, the natural construction is to say "go-downs at" in the body of the document had not been filled in because of the effort which would be put upon the persons filling it in, in filling in each particular place, when in fact it might be done generically by saying "go-downs situated at" so-and-so at the end. G I think, very likely, that that particular phrase was put at the end so that the bank manager who wanted to do his business rapidly could see what the go-downs were on the goods in which he had a charge. He could look at the back and see it rapidly. It was intended that the "go-downs situated at" should be filled in with the same names of H the go-downs which are contained in the body of the document. I do not myself see—and I have not really heard it explained—why they should put in "go-downs situated at" at the end with something other than go-downs which were intended to hold the produce over which the

charge was given. It was suggested, I know, that these were those go-downs which held the produce at a particular moment, but that does not seem to me of any particular advantage or use in a case in which the charge has not been given over the go-downs in which the produce

A was at that moment, or which was being given over a range of go-downs which might change from time to time, and where it was contemplated that at a future time a number of go-downs, perhaps extra go-downs, might be those over which the charge is given. I think, on the true construction of this document, the charge was given only over those

B go-downs specifically mentioned and that the seizure in respect of those only was rightly made.

I said there was another question on this part of the case which I was going to touch upon. It was not very much elaborated, but it was referred to : that is, whether in fact this was not a case of doubt, and

C whether, in the case of doubt, I could not get some guide from the way the parties had treated the letter of hypothecation ; that is to say, if I found they had treated it as a letter of hypothecation, giving a right over the produce in practically all the various go-downs in India belonging to Strauss, I could construe the charge as given over all those go-downs.

D I have looked through the document to see if I could give any effect to that, but I think it fails *in limine*. It fails *in limine* because, if the seizure was made solely under the letter of hypothecation, I cannot say that any rights acknowledged by Strauss & Co., Ltd., were acknowledged under the letters of hypothecation. I have looked through the letters

E beginning with the letter when the seizure took place. When I look through them, I find that various claims are made, claims both under this letter of hypothecation and claims under certain trust receipts, which are contained in document 6 ; and that also Messrs. Strauss, in acceding to the seizure which was made, were acceding, not only to the

F seizure under this document, but also to the seizure under the trust receipt, document No. 6. Therefore, I cannot say it was the agreement of Strauss & Co., Ltd., which led to the seizure at Cuddalore merely because you find there that Strauss's agree that the Chartered Bank shall seize at that particular place. I cannot say that they were agreeing to action

G under the letter of hypothecation, which was the document under which the goods were being seized. They might well have been seizing at either of those places. The seizure was made, or accepted, under the letter of hypothecation, but it might well have been made and/or executed, if I may use that phrase, either under the letter of hypothecation

H or under the trust receipts. With regard to the trust receipts, it is common ground that I cannot give effect to them. They have only a limited application, an application where it shall be shown that certain goods were purchased under certain drawings and where, if I may so describe it, the goods can be married to the drawings. So far as I am

concerned, no evidence has been given marrying any goods to any drawings, and, therefore, I cannot say that the trust receipts in this case have any effect. The result is that so far as the Chartered Bank is concerned, I hold that it is entitled to seize only the goods in the places mentioned at the end of document 8.

I have been asked to decide the questions as issues, and I decide them as issues perhaps for two reasons: first, because I think that an appeal on an issue will lie at once, and secondly, because the case, if it is desired to decide other matters, or issues, can go before another judge or another court.

Solicitors: *E. F. Turner & Sons* (for the plaintiff bank); *Linklaters & Paines* (for the defendant bank); *Slaughter & May* (for the company).

[Reported by GERALD ABRAHAM, ESQ., Barrister-at-Law.]

Re EISER'S WILL TRUSTS, FOGG v. EASTWOOD.

[CHANCERY DIVISION (Bennett, J.), December 15, 16, 1936.]

Executors—Guarantee by testatrix of son's debt—Son appointed executor—Son also beneficiary under will—Security taken from son after execution of will—Whether debt released.

Will—Debt owing to estate by beneficiary taking protected life interest—Primary trust determined—Right of trustees to apply income for his maintenance before debt repaid.

A testatrix guaranteed her son's loan account at a bank. She then made a will appointing him one of her executors and giving him a legacy of £100 and a protected life interest in the income of her residuary estate. She then guaranteed the son's overdraft on his current account. On each occasion the son charged his estate and interest in a public-house to secure such sum as the testatrix might be called upon to pay. The estate of the testatrix was about to be called upon to pay a sum of over £5,000. The son after the death of the testatrix executed a deed of assignment for the benefit of his creditors:—

HELD: (i) the fact that the testatrix required security for the repayment of the debt after the execution of her will showed an intention not to release the debt, and the son was liable to the estate in the amount which would have to be paid to the bank.

(ii) notwithstanding that the debt or some part might remain unpaid, the trustees of the will were entitled to pay in their discretion such part of the income as they might think necessary for the son's maintenance and support.

[EDITORIAL NOTE.] The second point of this case is probably of greater interest than the first. The position is that the event has happened upon which the primary trust under a protected life interest was to be determined. The trustees therefore hold the income to be applied at their discretion for the maintenance and support of the class mentioned in the Trustee Act, 1925, s. 33, which includes the principal beneficiary. In these circumstances, if the trustees decide to apply the income or some part thereof to the maintenance and support of the principal beneficiary, must such sum be applied first to the reduction of a debt which such principal beneficiary owes to the estate? The decision is that they may apply such part

of the income, if they think fit, for the support of the principal beneficiary without reference to the payment of the debt.

AS TO RELEASE OF DEBT BY APPOINTMENT OF DEBTOR AS EXECUTOR, see HALSBURY, Hailsham Edn., Vol. 14, pp. 348, 349, paras. 653-655; and FOR CASES, see DIGEST, Vol. 23, pp. 39-41, Nos. 140-167.

- A AS TO RIGHT OF BENEFICIARY UNDER DISCRETIONARY TRUST TO MAINTENANCE AND SUPPORT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 202, 203, para. 270; and FOR CASES, see DIGEST, Vol. 5, pp. 652, 653, Nos. 5827-5838]

Cases referred to :

- B (1) *Re Abrahams, Abrahams v. Abrahams*, [1908] 2 Ch. 69; 23 Digest 439, 5083.
 (2) *Re Bullock, Good v. Lickorish* 1891), 60 L.J. Ch. 341; 43 Digest 787, 2267.
 (3) *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212; 23 Digest 439, 5085.
 (4) *Re Coleman, Henry v. Strong* (1888), 39 Ch. D. 443; 44 Digest 1100, 9492.
 (5) *Re Neil, Hemming v. Neil* (1890), 62 L.T. 649; 43 Digest 854, 3021.

- C ADJOURNED SUMMONS by one of the executors of the will of Mrs. Lucy Dora Fanny Susannah Eiser, deceased, for the determination of the questions hereinafter set out. The other executor was Ronald Eastwood, the son of the testatrix, and he was also the first defendant. The other defendants were the trustee of a deed of assignment, which the son had executed after the death of the testatrix, and Dr. Barnardo's
 D Homes, who were interested in the residuary estate.

- E Mrs. Eiser, the testatrix, deposited securities with a bank to secure a loan account at the bank, the loan being granted to her son. Later she made her will, giving her son a pecuniary legacy of £100 and the income of her residuary estate upon protective trusts for his benefit during his life. After the execution of the will her securities were made available to secure an overdraft on her son's current account. In each case, the son had charged his interest in a public-house to secure the repayment to the testatrix of such sums as she might be called upon to pay. The testatrix appointed her son one of the executors of her will.

- F The summons asked for the determination of the following questions.

- G (1) (a) whether the first defendant is a debtor to the estate of the testatrix in the sum of £5,447 4s. 8d. or such other sum which the National Provincial Bank, Ltd., may retain out of the proceeds of sale of certain securities deposited by the testatrix with the bank to secure the first defendant's loan account and overdraft at the said bank; or (b) such sum is to be treated as an advance made by the testatrix to the first defendant of the said sum; (2) whether, in the event of the said sum falling to be treated as a debt due from the first defendant to the testatrix, (a) the plaintiff ought to set off a legacy of £100 to the defendant *pro tanto* against such debt, (b) the plaintiff is entitled from time to time, notwithstanding that the said debt or some part thereof may remain unpaid, (i) to pay such part of the income of the residuary estate as in the exercise of his discretion he thinks fit to the first defendant, or (ii) to pay or apply such part of the income of the residuary estate as in the

exercise of his discretion he thinks fit for the maintenance and benefit of the first defendant otherwise than by paying the sum to him, (c) the plaintiff should accumulate such part of the said income as in the exercise of his discretion he shall think fit and set such accumulations off *pro tanto* against the said debt; (3) that if and so far as is necessary the estate of the testatrix may be administered by the court; (4) that the costs of the application may be provided for. A

The following are the material clauses of the will :

2. I appoint my friend and solicitor John Hampson Fogg and my son Ronald Eastwood (hereinafter called my trustees) to be my executors and trustees of this my will provided that on the death or retirement of the said John Hampson Fogg I appoint the Public Trustee to be a trustee of this my will. . . . 5 (a). I give and bequeath . . . to my son Ronald the sum of £100 which shall be payable so soon after my death as shall be practicable. . . . 6. I give and bequeath all the residue of my property not hereby otherwise disposed of to my trustees upon trust to sell call in and convert the same into money at such time or times and in such manner as they shall think fit with power to postpone the sale calling in or conversion of the whole or any part or parts of the said property during such period as they shall think proper and to retain the same or any part thereof in the actual form of investment without being responsible for loss and after payment thereof of my funeral and testamentary expenses and debts to invest the same and to hold the income thereof upon protective trust for the benefit of my said son Ronald during his life. . . . B C

and then followed certain provisions which should apply after his death. D

Roger Turnbull for the plaintiff.

R. Cozens Hardy Horne for the first defendant.

A. E. Woodgate for the second defendant, a trustee under a deed of assignment made by the first defendant. E

F. Baden Fuller for Dr. Barnardo's Homes, interested in the residuary estate.

Turnbull : The first question is whether the first defendant is to be treated as a debtor to the estate or whether the sum in question is to be treated as an advance. If the sum is to be treated as a debt, there is a question whether it is to be set off against such sum as the first defendant gets under the will. F

BENNETT, J. : Mrs. Eiser deposited securities to secure an overdraft for her son at the National Provincial Bank, Ltd., and on Feb. 28, 1934, she charged those securities for the purpose of securing the first defendant's debt on loan. On Mar. 29, 1934, the first defendant, for the purpose of securing her liability to the bank, by an instrument of charge, charged a public-house in Harrow Road, in the county of Middlesex, in favour of Mrs. Eiser, the testatrix, to secure the amount owing by the first defendant to the bank upon his loan. On Feb. 22, 1935, the testatrix made her will. She appointed the first defendant one of the executors of the will and she gave to the first defendant, who was her son, a legacy of £100 and gave all the residue of her property G H

- not otherwise disposed of to her two trustees on trust for sale for conversion to invest the proceeds of sale and to hold the income upon protective trusts for the benefit of the first defendant during his life. After that date, in Dec., 1935, her securities deposited with the National
- A Provincial Bank were made available to secure the overdraft on the first defendant's (her son's) current account with the National Provincial Bank to a limit of £250, and on Jan. 20, 1936, the first defendant charged his interest in the public-house in favour of the testatrix to secure any sums she might have to pay the bank in respect of her
- B security. The question is asked whether the first defendant is a debtor to the estate of the testatrix of £5,447 or for such sum as the National Provincial Bank may claim out of the sale of the securities deposited by the testatrix with the bank. That is the sum which the first defendant owed to the bank. It is conceded that the testatrix did not release the debt,
- C but there are facts from which the court could presume that when at first she appointed the son one of her executors she did intend to release the debt. In my judgment, it points the other way, because after the date when the testatrix appointed her son one of her executors, she took from him a charge to secure her securities in case she had to pay the
- D bank. It is inconceivable to me that, if she intended her will to release him from what he owed her, she should have taken from him this charge. The first defendant is a debtor to the estate, not necessarily in the sum of £5,447, but in whatever the sum may be which the bank takes out of the lady's securities.
- E *Turnbull*: The next question is what are the trustees to do with the income of the residue. An order has been made on the footing that the primary trust has come to an end. Can the plaintiffs apply the money for the benefit of the first defendant, or can he take any benefit out of the estate until he has made good his debt? Under the will, the residue
- F is to be held on protective trusts for the benefit of the first defendant.
- Horne*: The trustees might have some discretion to pay the income to the son. If they choose to pay it to him direct, it might be thought that, having decided to pay him direct, they ought to apply it in reduction of the debt. There can be no doubt that, if they applied it for his maintenance, they would be acting as they were perfectly entitled to act. The
- G principal beneficiary is not entitled to anything, but he is entitled to be maintained. [Counsel referred to: *Re Abrahams, Abrahams v. Abrahams* (1); *Re Bullock, Good v. Lickorish* (2).]
- Baden Fuller*: In the first place, the Trustee Act, 1925, s. 33, deprives
- H him of the right to receive the income. But I am not sure that that is the right view, because the cases which have hitherto affirmed this are concerned with assignees of the beneficiary. Here it is not a case of an assignee, but a case which comes under the equitable doctrine of a beneficiary not being entitled to receive any benefit until he has made good to

the estate that which he owes. The defendant owes the estate about £5,000, and if he were a solvent person it would be a good asset.

BENNETT, J. : Has not the event arisen whereby he has lost the right to receive income ?

Baden Fuller : I do not know that I can put it differently. It is his right to receive it which gives the opportunity to the trustee to say, "I now apply that in payment of your debt for you on your behalf." If he had not the right to receive it, the trustee could not apply it in that fashion. The part which he is entitled to receive is applied in payment of what he owes. [Counsel referred to : *Re Akerman, Akerman v. Akerman* (3) ; *Re Coleman, Henry v. Strong* (4) ; *Re Neil, Hemming v. Neil* (5).]

BENNETT, J. : I answer that question in the affirmative. Notwithstanding that some part of the debt to the estate remains unpaid, the plaintiff may from time to time pay to the first defendant such part as he thinks necessary for his support and maintenance, instead of paying or of appropriating the same to the debt.

Declaration that (a) first defendant is a debtor to the estate in respect of the sum or sums paid out of the estate to the National Provincial Bank or the sum or sums retained by the said Bank out of the proceeds of sale of the securities deposited in respect of the guarantee of the first defendant's loan account or overdraft ; (b) in the events which had happened the trusts imposed by Trustee Act, 1925, s. 33 (1) (i), upon the residuary estate had determined ; (c) the plaintiff should set off the legacy of £100 against such debt ; (d) notwithstanding the said debt or some part thereof is still unpaid, the plaintiff may apply such part of the income of the residuary estate as he in his discretion thinks fit to the maintenance support or for the benefit of the first defendant otherwise than by paying or appropriating the same pro tanto to the said debt. Costs as between solicitor and client to be paid out of the estate.

Solicitors : *J. Hampson Fogg* (for the plaintiff and the first defendant) ; *Corner & Co.* (for the second defendant) ; *H. B. Nisbet & Co.* (for the defendants, *Dr. Barnado's Homes*).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

FORBES v. THE ATTORNEY-GENERAL OF MANITOBA.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Maugham), **December 17, 1936.**]

A *Privy Council—Canada—Provincial income tax—Deduction by employer from wages—Dominion civil servant—"Employee"—Occupied field—British North America Act, 1867 (c. 3), ss. 91, 92—Special Income Tax Act, 1933 (c. 44 (Manitoba)), ss. 2, 3, 4, 5, 6, 7.*

B By the Manitoba Special Income Tax Act, 1933, which is entitled "an Act to impose a special tax on incomes" it is provided by sect. 3 (1):
 " . . . every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of 2 per cent. upon the amount of all wages earned by or accruing due to him on or after May 1, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part. . . ." Subsequent sections provide for the deduction of the amount of the tax by the employer before payment of wages to the employee, and sect. 7 provides: "In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee forthwith to pay the tax." Sect. 2 (1) defines the words "employee," "employer," and "wages" in general terms.

C The appellant was a civil servant of the Dominion of Canada, who throughout the material period was resident in the province of Manitoba and performed his official duties there. Payment of his salary was made
 D by an order on the Receiver-General of Canada at Ottawa, transmitted to the appellant from Ottawa, and cashed by him in Manitoba. The salary was paid without any deduction of tax. In an action to recover a sum representing a tax of 2 per cent. on his remuneration under the Special Income Tax Act, 1933, the appellant contended (i) that the tax on wages imposed by the Act was not "direct taxation within the province in order to the raising of a revenue for provincial purposes" within the British North America Act, 1867, s. 92 (2), and was consequently invalid, (ii) that it was incompetent for the provincial legislature to tax the income of a Dominion civil servant, (iii) that he was not an "employee" at all within the meaning of the Act, and further that the Dominion was not his "employer" within the meaning of the Act, and (iv) that the Dominion Parliament, by enacting a general Dominion income tax in 1917, had already so occupied the field of this form of taxation as to preclude the Manitoba legislature from enacting any income tax legislation :—

E
 F HELD: (i) the provision for deduction by the employer of the tax imposed by sect. 3 was merely machinery for the collection of the tax, and the tax was a direct tax on employees and was therefore valid.

G (ii) it was competent for the provincial legislature to tax the income of a Dominion civil servant.

(iii) the appellant was an "employee" within the meaning of the Act, and the Dominion was his "employer" within sect. 7 of the Act, which applied in the present case.

H (iv) the doctrine of "occupied field" applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. In the present case, both income taxes could co-exist and be enforced without clashing.

[EDITORIAL NOTE. The Manitoba legislature passed an Act purporting to tax wages, i.e., an income tax Act. It was alleged that this Act of that legislature was *ultra vires* and, if the decision were against that view, then the Act was inapplicable

to a civil servant of the Dominion of Canada. The decision is against both these contentions.

AS TO LEGISLATIVE POWER OF THE PROVINCE, see HALSBURY, Hailsham Edn., Vol. 11, pp. 92, 93, para. 157; and FOR CASES, see DIGEST, Vol. 17, pp. 434-445, Nos. 131-180.]

Cases referred to :

- (1) *Halifax Corpn. v. Fairbanks' Estate*, [1928] A.C. 117; Digest Supp. A
- (2) *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; 17 Digest 435, 136.
- (3) *Abbott v. St. John City* (1908), 40 S.C.R. 597; 17 Digest 436, case j.
- (4) *Caron v. R.*, [1924] A.C. 999; Digest Supp.
- (5) *Croft v. Dunphy*, [1933] A.C. 156; Digest Supp.
- (6) *Citizens Insurance Co. of Canada v. Parsons, Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; 17 Digest 436, 145. B
- (7) *A.-G. for Manitoba v. A.-G. for Canada*, [1925] A.C. 561; Digest Supp.
- (8) *City of Charlottetown v. Foundation Maritime, Ltd.*, [1932] S.C.R. 589; Digest Supp.
- (9) *Burland v. R., Alleyn v. Barthe*, [1922] 1 A.C. 215; 17 Digest 436, 142.
- (10) *Cotton v. R.*, [1914] A.C. 176; 17 Digest 436, 141. C
- (11) *Re Silver Bros., Ltd., A.-G. for Quebec v. A.-G. for Canada*, [1932] A.C. 514; Digest Supp.
- (12) *Munro v. Stamp Duties Comr.*, [1934] A.C. 61; Digest Supp.

APPEAL by James Forbes, by special leave, from a majority judgment of the Supreme Court of Canada (SIR LYMAN POORE DUFF, C.J., LAMONT and DAVIS, JJ.; CANNON and CROCKET, JJ., dissenting), dated Jan. 15, 1936, affirming a judgment of the Court of Appeal of Manitoba (PRENDERGAST, C.J.M., DENNISTOUN, TRUEMAN, ROBSON and RICHARDS, JJ.A.) dated Nov. 12, 1934, dismissing an appeal by the appellant from a judgment of CORY, J., of the county court of Winnipeg, dated June 8, 1934. D E

The facts of the case relevant to the appeal appear in the judgment of their Lordships delivered by LORD MACMILLAN.

C. E. Finkelstein for the appellant: As the Act imposes indirect taxation, it is *ultra vires* the provincial legislature. The province cannot intercept moneys in the hands of the Dominion, and the province in this case attempts to tax moneys in the hands of and the property of the Dominion. The provincial legislature cannot tax the salaries of Dominion Crown civil servants. The appellant did not receive any remuneration from an "employer" under the Act, and is therefore not liable to make payment under sect. 7. The Dominion Parliament enacted legislation respecting taxes on incomes, and, having drawn the same into the domain of Dominion legislation, the provincial legislature could not enact legislation within that field. [Counsel referred to: *A.-G. for Manitoba v. A.-G. for Canada* (7), *Charlottetown (City) v. Foundation Maritime, Ltd.* (8), *Burland v. R.* (9), *Cotton v. R.* (10), *Re Silver Bros., Ltd.* (11), *Caron v. R.* (4), *Munro v. Stamp Duties Comr.* (12).] F G H

Isaac Pitblado, K.C., and Wilson E. McLean for the respondent were not called upon.

LORD MACMILLAN: The Attorney-General of the province of Manitoba, suing on behalf of His Majesty in right of the province, seeks in these proceedings to obtain judgment against the appellant for a sum of \$20.80, being tax alleged to be due by him under the Special Income Tax Act, 1933, of the province of Manitoba.

The appellant is a civil servant of the Dominion of Canada and holds the office of a meat inspector in the Health of Animals branch of the Dominion Department of Agriculture. Throughout the material period, he was resident within the province of Manitoba, and performed his official duties there. His remuneration was at the rate of \$115.25 per month, plus 5 per cent. added and retained as a contribution to a super-annuation fund. Payment was made to him monthly by an order on the Receiver General of Canada at Ottawa, transmitted to him from Ottawa, and cashed by him in Manitoba. The sum sued for is stated to represent a tax of 2 per cent. on the remuneration so received by the appellant during the period from May 1 to Dec. 31, 1933. The appellant received his salary without any deduction of tax. The action was initiated in the county court of Winnipeg, where judgment was given against the appellant. The decision of the county court judge was unanimously affirmed by the Court of Appeal of the province of Manitoba, whose judgment in turn was upheld by a majority of the Supreme Court of Canada (DUFF, C.J., LAMONT and DAVIS, JJ., CANNON and CROCKET, JJ., dissenting). The grounds of defence on which the appellant relied before their Lordships were, broadly stated, that the Special Income Tax Act of 1933, so far as purporting to tax wages, and in particular the wages or salaries of Dominion civil servants, was unconstitutional and *ultra vires* of the provincial legislature, and that the statute was in any event inapplicable to the appellant as a civil servant of the Dominion of Canada.

In order to deal with the arguments submitted on behalf of the appellant, it is necessary to set out at length the material provisions of the enactment in question. The statute is entitled "an Act to impose a special tax on incomes." It contains two main parts, the first of which is headed "Taxation of wages" and the second "Taxation of income other than wages." The following quotations are from Part I, on which the action is based:

3.—(1) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of 2 per cent. upon the amount of all wages earned by or accruing due to him on or after May 1, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part . . .

[Here follow certain exemptions inapplicable to the present case.]

4.—(1) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the 15th day of the month next follow-

ing that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

(2) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

(3) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

5.—(1) Every employer shall keep at some place in the province, of the location of which he shall inform the administrator when requested to do so, a true and correct record of the names and residential addresses of all his employees, and of the dates upon which each of them worked, the wages paid to each, and such other matters as the administrator requires.

(2) Every employer shall, on request of the administrator or any person authorised by him in writing, produce for inspection all records kept by the employer relating to his employees.

6.—(1) If an employer, in violation of the provisions of this part, fail to collect and pay over any tax imposed by this part, the administrator may demand and collect from him as a penalty 10 per cent. of the tax payable, and he shall in addition be liable to a fine of \$10 for each day of default, but not to more than \$200.

(2) Every person, who contravenes any provision of this part in respect of which no penalty is otherwise provided, shall be liable to a fine not exceeding \$500, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

7. In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee forthwith to pay the tax, and all the provisions of sects. 23, 23A, 24 and 25 of the Income Tax Act shall, *mutatis mutandis*, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them.

Sect. 2 (1) of the Act provides the following interpretations :

(b) "Employee" means any person who is in receipt of or entitled to any wages.

(c) "Employer" includes every person, manager, or representative, having control or direction of, or responsible, directly or indirectly, for the wages of any employee, and in case the employer resides outside the province, the person in control within the province shall be deemed to be the employer.

(d) "Wages" includes all wages, salaries, and emoluments from any source whatsoever, including—

(i) any compensation for labour or services, measured by time, piece, or otherwise ;

(ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the provincial legislative councils and assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court and of all persons whatsoever, whether such salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person.

Taking the contentions of the appellant in the order in which they were advanced, their Lordships deal first with his submission that the tax on wages which the Act imposes is not "direct taxation within the province in order to the raising of a revenue for provincial purposes" within the meaning of the British North America Act, 1867, s. 92 (2),

and is consequently invalid. This argument, it will be observed, would, if sustained, invalidate the tax as regards all wage earners in Manitoba, and not merely in the case of Dominion civil servants. While in the heading of this part of the Act the tax is described as a "tax on wages,"

A it would be more accurate to describe it as a tax on employees in respect of, or measured by, their wages, and indeed it is described in sect. 4 as "the tax imposed on the employee by this part." Now, all are agreed that an income tax is the most typical form of direct taxation :

B The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation,

per VISCOUNT CAVE, L.C., in *Halifax Corp'n. v. Fairbanks' Estate* (1), at p. 125. If, then, the tax in question is an income tax, there is an end of the matter. *Prima facie* the tax is an income tax. The statute

C imposing it is entitled "an Act to impose a special tax on incomes." It invokes the aid of provisions of the Manitoba Income Tax Act, 1924, and in sect. 16 the Lieutenant-Governor in Council is empowered to make regulations for the joint administration of the Act and the Manitoba Income Tax Act. The Act as a whole covers all taxable income, Part I

D dealing with one form of income, namely income from wages, and Part II dealing with income other than wages. Wages are undeniably income, and the tax is, by sect. 2, imposed on employees in respect of the wages earned by them. A tax is not the less a tax on income because it is imposed on a particular component of the taxpayers' income. It may

E be convenient to tax one part of the tax-payers' income in one way, another part in another way. Moreover, the tax is not in any way discriminatory, for it is imposed on all wage earners indiscriminately. To all this the appellant answers that, while the statute may profess to charge the tax on the wage earner in respect of his wages, it enacts

F that it is to "be levied and collected . . . in the manner prescribed by this part," and the manner prescribed is that the employer is to deduct the amount of the tax from the wages which he pays to his employees and account for it to the Crown. The tax, he says, is thus really imposed on the employer ; it is not a tax on any income which the employee

G receives, but a tax on the wage fund in the hands of the employer, and the tax is thus only indirectly imposed on the employee. Their Lordships cannot accept this argument. In their view, sect. 3 is what it professes to be, a section charging the tax on the employee. The following sections which provide for the deduction of the amount of the tax

H by the employer before he pays over his employee's wages, are mere machinery, and machinery of a very familiar type in income tax legislation. The expedient of requiring deduction of tax at the source, as it is called, is one which has long been in effective use in the United Kingdom. A taxpayer is said either to pay or to bear income tax,

according as he pays it himself or suffers deduction of it from moneys due to him, but in either case he is the taxpayer, and on him the burden of the tax is imposed. In their Lordships' opinion, the present tax is a direct tax on employees in respect of that portion of their income which consists of wages. A

The appellant's second contention was that it is incompetent for the provincial legislature to tax the income of a Dominion civil servant. Why so?

Any person found within the province may legally be taxed there if taxed directly : B
per LORD HOBHOUSE, in *Bank of Toronto v. Lambe* (2), at p. 584. The appellant's argument is that the tax offends against the exclusive legislative authority of the Dominion Parliament in "the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada" under the British North America Act, s. 91 (8). If, C
 he says, the provincial authorities can tax at the rate of 2 per cent. the salary which he receives from the Dominion to enable him to live in the province and discharge his duties there, they can tax his salary to such an extent as to render it impossible for him to live and perform his duties. A similar argument *in terrorem* was advanced and rejected in D
 the case of the *Bank of Toronto v. Lambe* (2), at p. 586.

LORD HOBHOUSE there said :

It is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. E

The validity of imposing direct taxation by provincial legislation on a Dominion official has been expressly established by authority in the case of *Abbott v. St. John City* (3), which was approved by this Board F
 in *Caron v. R.* (4). LORD PHILLIMORE, in delivering the judgment of the Board, at pp. 1005, 1006, quoted this passage from the judgment of DAVIES, J., in *Abbott's case* (3) at p. 606 :

The province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents. G

Dealing with the suggestion that provincial taxation might paralyse the Dominion civil service, DAVIES, J., adds at p. 607 that :

if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power. H

It should perhaps be explained that in *Caron's case* (4) the validity of the Dominion Income War Tax Act, 1917, as affecting the salary of a minister of a provincial government, was upheld. The present case is

the converse. In their Lordships' opinion, the appellant's second contention must share the fate of the first.

Next, the appellant submits that he is not an "employee" at all within the meaning of the Act, and, further, that the Dominion is not his employer. CANNON, J., in the distressing picture which he draws of the civil servant's lot, seems to share this view. It is not, however, the view of the Dominion legislature, which, in the Civil Service Act, 1927, R.S.C., c. 22, uses the word "employees" in speaking of civil servants, and, indeed, in sect. 2 interprets "employees" to mean and include "officers, clerks, and employees in the civil service." But the Act is quite explicit, and the appellant clearly falls within the definition of "employee" in sect. 2 (1) (b), for he "is in receipt of . . . wages," and "wages" by sect. 2 (1) (d) include "all wages, salaries, and emoluments from any source whatsoever," and in particular "(ii) the salaries of all persons whatsoever whether such salaries . . . are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof or any person." To this there can really be no answer. The appellant, however, seeks to extricate himself by arguing that, even if he is an employee, the Dominion government is not his employer within the meaning of the Act. If the Dominion is his employer, the combined effect of sect. 3 of the Act imposing the tax on him as an employee, and sect. 7 requiring him "to forthwith pay the tax" if his wages are paid to him "without the tax imposed thereon being deducted by his employer"—which is the case with the appellant—leads inevitably to judgment against him. If the Dominion is not his employer, then he maintains that the condition of the tax not having been deducted by his employer has not been fulfilled, and he escapes from the conditional obligation to pay imposed by sect. 7. In support of the submission that the Dominion is not an "employer" within the meaning of the Act, the appellant refers to sects. 4, 5 and 6 of the Act, where the duties of deduction, of accounting, of making returns, and of keeping records are imposed upon "every employer" under penalties. This cannot, he says, apply to the Dominion, for it would be *ultra vires* of the provincial legislature to impose duties and corresponding penalties on the Dominion government; if the provincial legislature has done so, the legislation is invalid. Their Lordships agree that in these sections the term "employer" does not, on a sound construction, apply to the Dominion government. But equally it does not apply to all other employers outside the province. And this for the very good reason that the revenue laws of a country are addressed to the inhabitants of that country, and are ineffectual to reach or affect persons beyond its borders. Indeed,

it may be accepted as a general principle that states can legislate effectively only for their own territories,

as was said in *Croft v. Dunphy* (5), at p. 162. Therefore when a revenue statute of Manitoba addresses "every employer," and requires him under penalties to discharge certain duties in relation to the collection of the revenue of the province, the order must be construed as addressed to "every employer" who is subject to the legislature, and as inapplicable A
to employers beyond its jurisdiction, notwithstanding that the language in which the term "employer" is defined in the Act is sufficiently wide to include persons beyond its jurisdiction. On the other hand, their Lordships are equally clear that there is no such obstacle in the way of construing the word "employer," where it occurs in sect. 7 in the phrase B
"without the tax imposed thereon being deducted therefrom by his employer," as including the Dominion government or any other employer outside Manitoba. The comprehensive meaning of the term "employer" is here free to operate, for the provision in question does not seek to impose any duty on persons outside the province; it merely refers to a C
question of fact, the fact of the employer, wherever or whoever he may be, not having deducted the tax in paying wages to a person within the province. It is not *ultra vires* of the provincial legislature to provide that, if a wage earner within the province receives his wages from an employer outside the province without deduction of tax, the wage earner D
shall himself pay the tax, whether the outside employer be the Dominion government or anyone else. Such legislation is not legislation affecting persons outside the province with any duty or liability.

The last ground on which the appellant took his stand is even less tenable. He submitted that the Dominion Parliament, by enacting a E
general Dominion Income Tax in 1917, had already so occupied the field of this form of taxation as to preclude the Manitoba legislature from enacting any income tax legislation. In their Lordships' opinion, this submission, which, if well founded, would invalidate the whole Act and not merely Part I, is based on a misconception of the doctrine of the F
"occupied field" evolved in the interpretation of the British North America Act. The Dominion Parliament has exclusive authority, under sect. 91 (3), to make laws for "the raising of money by any mode or system of taxation," and each province under sect. 92 (2) has the exclusive right to make laws for "direct taxation within the province G
in order to the raising of a revenue for provincial purposes." It was pointed out in *Citizens Insurance Company of Canada v. Parsons* (6), at p. 108, that, though the description "the raising of money by any mode or system of taxation" is :

sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that . . . the general power should override the particular one. H

This statement is quoted and approved in *Bank of Toronto v. Lambe* (2),

at p. 585. The doctrine of the "occupied field" applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. Here there is no conflict. Both income taxes may co-exist, and be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The province reaps another part of it. This argument therefore also fails.

Their Lordships have now disposed, adversely to the appellant, of all the grounds on which the validity of the tax in question was challenged before them, and they will accordingly humbly advise His Majesty that the appeal be dismissed. As their Lordships were informed that it had been agreed between the parties that they should each bear their own costs throughout these proceedings, there will be no order as to costs.

Appeal dismissed.

Solicitors: *Herbert Smith & Co.* (for the appellant); *Blake & Redden* (for the respondent).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

WILLOUGHBY v. ECKSTEIN (No. 2).

[CHANCERY DIVISION (Luxmoore, J.), **October 16, December 16, 1936.**]

Easements—Light—Statutory right—Prevention of acquisition—Agreement or consent in writing—Prescription Act, 1832 (c. 71), s. 3.

By a lease granted in 1899 certain rights were conferred upon the lessee "but without including any rights of light or other easements over other ground or premises . . . and subject to adjacent buildings or any of them being at any time or times rebuilt or altered." The lessor was also the landlord of adjacent property which, in 1934, was rebuilt in such a manner as to obstruct certain windows of the property the subject of the lease of 1899:—

HELD: (i) the clause in the lease of 1899 above-mentioned constituted an agreement by the lessee that any enjoyment of light in respect of the premises demised to him was to be permissive only throughout the whole of the term and there was a sufficient agreement or consent in writing relating to the enjoyment of light to satisfy the requirements of the proviso to the Prescription Act, 1832, s. 3, and to prevent the acquisition by the lessee of any statutory right to light under that section.

[**EDITORIAL NOTE.** There is here a consideration of all the cases upon the construction of the last words of the Prescription Act, 1832, s. 3, referring to a "consent or agreement expressly made or given for that purpose by deed or writing." In the case of a lease this agreement must be one under which the enjoyment of light is permissive throughout the whole term, if the acquisition of the statutory right is to be prevented.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 348, 349, para. 611; and FOR CASES, see DIGEST, Vol. 19, pp. 132, 133, Nos. 894-903.]

Cases referred to:

(1) *Morgan v. Fear*, [1907] A.C. 425; 19 Digest 129, 860.

(2) *Mitchell v. Cantrill* (1887), 37 Ch. D. 56; 19 Digest 128, 858.

(3) *Haynes v. King*, [1893] 3 Ch. 439; 19 Digest 132, 898.

(4) *Foster v. Lyons & Co.*, [1927] 1 Ch. 219; Digest Supp.

ACTION for damages and an injunction in respect of nuisance by alleged illegal obstruction of certain of the windows of premises known as 13, Balfour Mews, Aldford Street, London, in the occupation of the plaintiff under a lease dated Aug. 29, 1899, alleged to be caused by the alteration by the defendant of the adjoining premises, 15, Balfour Mews, in his occupation under a lease, dated Dec. 25, 1897, the plaintiff and defendant deriving title from a common lessor. The decision in these proceedings was on a point of law which was set down for argument under an order of MASTER CHANDLER, dated June 25, 1936, and which runs as follows:

Whether upon the facts appearing in the statement of facts agreed between the parties [the relevant parts of which are set out in the judgment herein] the access of light to the windows of the plaintiff's premises has been enjoyed by a consent or agreement expressly made or given for that purpose by deed or writing within the meaning of the Prescription Act, 1832, s. 3.

The deed or writing referred to in the master's order was the plaintiff's lease of Aug. 29, 1899, which contained, after words conferring on the plaintiff certain rights of way and user over Balfour Mews, the following provision:

but without including any rights of light or other easements over other ground or premises and subject nevertheless to all rights and easements belonging to any adjacent property and subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans both as to height, elevation, extent and otherwise as shall or may be approved of by the ground landlord for the time being.

Ronald F. Roxburgh, K.C., and L. W. Byrne for the plaintiff in the action.

Gavin Simonds, K.C., and F. Suttill (G. A. Rink with them) for the defendant in the action.

Simonds, K.C.: The provision in the plaintiff's lease is a consent or agreement within sect. 3 of the Prescription Act. This case is covered by *Mitchell v. Cantrill* (2), the *ratio decidendi* of which is explained by NORTH, J., in *Haynes v. King* (3) and EVE, J., in *Foster v. Lyons & Co.* (4), and by the two last-mentioned cases. The document in this case is or contains an agreement within the meaning of sect. 3, because (i) there is excluded from the grant any right of light and other easements, (ii) there is a provision which is nothing more than a grant by the lessee to the lessor of the right at any time to rebuild or alter the premises, which can only refer to rebuilding or altering, notwithstanding that, by so doing, rights, including the right to light, will be interfered with.

Roxburgh, K.C.: There is a vital distinction between this case and those mentioned by Counsel for the defendant in all of which there was a grant of light express or implied. This case turns on the statute rather than upon

- the cases. It is necessary to find a document which expressly confers upon the lessee either a right to light or to the access and use of light. Such a right existed in the above-cited cases, but the document in this case expressly excludes any such thing. Sect. 3 is not referring to a *de facto* enjoyment of light. This difficulty did not exist in the cases cited, because, there being nothing in them to negative the implication of a grant of light, the court was able to find in the document concerned something conferring upon the lessee some right to light which would bring the case within the section. When nothing is said in a lease about light, the right to light is appurtenant to the grant of the lease, with the result that there is an implied grant except so far as it is subsequently cut down. But there cannot be any such implied right when it is expressly excluded. NORTH, J., was alive to this difficulty in *Haynes v. King* (3), and it appears, though less clearly, in *Foster v. Lyons & Co.* (4).
- What EVE, J., must have meant there was that the lessor, first of all having by implication granted a right to light, either cut down that original grant or got a re-grant *pro tanto*. But whichever way you put it it is necessary to find some right granted before it is possible to get an exception out of it.
- If my first point is bad, then I say that this case is covered not by *Haynes v. King* (3) or by *Foster v. Lyons & Co.* (4), but by *Mitchell v. Cantrill* (2). The cardinal distinction between that case and the two subsequent ones was that in the later ones there was a distinct reference to light, and some such phrase is necessary in order to make a case fit the statute, because, until something is found in the instrument which is contained in or implied from the statute, there is nothing to which the qualification in the section can be attached. It cannot be suggested that there is any real difference between the words in *Mitchell v. Cantrill* (2) and those in the present case (see p. 59) and there is no reason why the clause in this case should not be similarly construed.
- Simonds, K.C.*, in reply : The argument for the plaintiff is based on a misconception. What you have to do is to look at the whole instrument under which *de facto* the lessee in this case enjoys light, and find out whether that light is enjoyed under an agreement or by some consent expressly made or given. The effect of the document is to confer the privilege of light so long, and only so long, as the lessor chooses, and sect. 3 applies if in the document regulating the rights of the parties no right to light is conceded, but there is a *de facto* enjoyment of light until it is obstructed. The demise of these premises carries with it a *de facto* enjoyment of light with a right in the lessor to interfere with that light by building.

With regard to the suggested distinction between *Mitchell v. Cantrill* (2) and the two later cases, it is for the court to determine whether upon the true construction of the instrument as a whole it is not an agreement

expressly made in order to regulate the right to light. As a matter of construction, it is not possible at one and the same time for the lessee to be acquiring a right under the Prescription Act, 1832, which would preclude the lessor from building and, at the same time, to give effect to the bargain which he has made that at any time the lessor may alter his premises in such a way as must necessarily affect his right to light. A

LUXMOORE, J. : The plaintiff is the lessee of No. 13, Balfour Mews, Aldford St., and the defendant is the lessee of the adjoining premises, No. 15, Balfour Mews. On July 29, 1935, the plaintiff issued a writ claiming among other relief an order directing the defendant to pull down so much of a building recently erected by him on his premises as caused a nuisance or illegal obstruction to certain of the windows of 13, Balfour Mews. Pleadings were delivered in the action in due course. On June 25, 1936, an order was made directing that a point of law raised by the defence should be set down for argument. The point of law is, whether upon the facts appearing in the statement of facts agreed between the parties the access of light to the windows of the plaintiff's premises has been enjoyed by a consent or agreement expressly made or given for that purpose by deed or writing within the meaning of the Prescription Act, 1832, s. 3. B C D

It appears from the statement of facts that the plaintiff is the lessee of No. 13, Balfour Mews, under a lease dated Aug. 29, 1899, granted by the then Duke of Westminster, and that the defendant is the lessee of No. 15, Balfour Mews, under a lease dated Dec. 25, 1897, granted by the same lessor. Some of the windows in the plaintiff's premises face No. 15, Balfour Mews. None of these windows has been altered since the lease of Aug. 29, 1899, was granted, nor was there any alteration in the buildings comprised in the lease of No. 15, Balfour Mews, until Jan., 1934. In that month the defendant started to rebuild No. 15, Balfour Mews. The new building was completed before Dec. 3, 1934, and was raised to a greater height than the original building, with the result that the windows in No. 13, Balfour Mews, have been obstructed. E F

The statement of facts discloses certain other facts which are not material to the question directed to be argued. It also contains an allegation that the obstruction of the plaintiff's windows has caused a nuisance or illegal obstruction. There is no admission by the defendant with regard to this allegation, but for the purpose of determining the question directed to be argued, and for no other purpose, I assume that the nuisance or illegal obstruction alleged exists. The plaintiff claims a right to the access of light to the windows referred to, as the same was enjoyed before the defendant's building operations were begun in Jan., 1934. She claims that right under sect. 3 of the Prescription Act, 1832, and on no other ground. That section provides : G H

When the access and use of light to and for any dwelling house, workshop, or other

building shall have been actually enjoyed therewith for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

- A It is settled law that, in the absence of any agreement excluding the operation of the Prescription Act, where two tenements are held by different lessees under a common landlord and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement without interruption, that lessee acquires an absolute and
- B indefeasible right to light as against the other tenement, and that the right enures in favour of that lessee and his successors, not only as against the other lessee, but also against the common landlord and all succeeding owners of the other tenement : see *Morgan v. Fear* (1).

- On the facts stated, the access and use of light to the windows referred
- C to was enjoyed for the full statutory period before the defendant's building operations started, and therefore, having regard to the decision in *Morgan v. Fear* (1), this enjoyment has conferred on the plaintiff in the present case a statutory right to light in respect of the windows referred to, unless the exception at the end of the section applies so as
- D to prevent the acquisition of the statutory right. It is to be observed that the exception, to be operative, must fulfil three conditions : (a) the agreement must be by deed or writing ; (b) it must be express ; and (c) it must also have been entered into for the purpose referred to in the section. There is no difficulty with regard to (a) and (b). The real
- E difficulty appears to me to arise on (c). The purpose referred to in the exception to the section is described in the section as " that purpose."

- The section has been considered by the Court of Appeal in *Mitchell v. Cantrill* (2), by NORTH, J., in *Haynes v. King* (3), and by EVE, J., in *Foster v. Lyons & Co.* (4). In *Mitchell v. Cantrill* (2), LINDLEY, L.J.,
- F said, at p. 62 :

The last words in the section mean that when you find an agreement under which the light is enjoyed you must look at that agreement and see what, if any, right to light is expressly given by it.

COTTON, L.J., at p. 60, said that if you find :

- G an express proviso in the contract between the parties that, notwithstanding the grant to the plaintiff [that is, the person claiming to have acquired a statutory right to light] the landlord [that is, the person against whose property the statutory right was claimed to have been acquired] should be at liberty to build so as to interfere with his right, that would be another point.

- H It was argued on behalf of the plaintiff that the word " right " was used deliberately, and that therefore the case decides that the proviso in the section only covers cases where the claimant to a statutory right to light has a right to light conferred on him by the grant, and that this view is supported by the passage I have already read from the judgment of LINDLEY, L.J. It appears to me that the word " right " is not used

in the passages I have referred to as meaning a contractual right to light in the narrow sense, but is used in the wider sense of a permissive enjoyment regulated by agreement between the persons concerned.

In *Mitchell v. Cantrill* (2), the demise was of a particular plot of land :

with all right and appurtenances, legal, used, or reputed, to the said plot of land except rights, if any, restricting the free use of any adjoining land or the conversion or appropriation at any time thereafter of such land for building or other purposes obstructive or otherwise.

The Court of Appeal held that these words could not be construed as an agreement for the enjoyment of light, but must be construed (per COTTON, L.J., at pp. 59, 60) as :

an exception out of the grant made of appurtenances and rights, so as to prevent the lessee from urging as against the landlord or anybody claiming through him, before a right had been obtained under the statute, that the landlord could not derogate from his own grant either by his building or granting to anybody else a right to build so as to interfere with the plaintiff's lights.

In *Haynes v. King* (3), the plaintiffs' lease contained a provision that :

notwithstanding anything herein contained, the lessors shall have power, without obtaining any consent from, or making any compensation to, the lessee, to deal as they may think fit with any of the premises adjoining or contiguous to the hereditaments hereby demised, and to erect, or suffer to be erected, on such adjoining or contiguous premises, any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light or air which may now, or at any time during the term hereby granted, be enjoyed by the lessee, or the tenants or occupiers of the hereditaments hereby demised.

NORTH, J., held that this constituted an agreement, within sect. 3 of the Prescription Act, sufficient to prevent the acquisition of any statutory right to light thereunder. The foundation of his decision was that the demise, in the absence of the particular provision, would have passed the right to enjoy all the light coming to the windows of the premises demised at its date, and he held that the provision must be construed as an express agreement that the enjoyment of light by the lessee under the demise of the premises was to exist only until the lessors should require to exercise the right expressly given to them by the provision.

In *Foster v. Lyons & Co.* (4), the parcels in the lease contained these words (p. 220) :

reserving nevertheless to the lessor, and his lessees and tenants, full right to build to any height upon the land adjoining the land and premises hereby demised, notwithstanding such buildings may obstruct any light on the land hereby demised.

EVE, J., said, at p. 227 :

The question is whether the words I have just read operate as an agreement within the section or were only meant to negative the implied right which the lessee would otherwise have had of insisting that the lessor should not derogate from his own grant by building on the adjoining land—in other words, does the case fall within the decision in *Haynes v. King* (3) or that in *Mitchell v. Cantrill* (2)?

Eve, J., pointed out that, apart from the words referred to, the lessee would have been entitled to the continued enjoyment of the light actually

enjoyed over the lessor's land at the date of the demise, and held that the material provision must be construed as a grant by the lessee to the lessor of the full right to build on his adjoining land notwithstanding the injury to light which might result from so doing, and that it could
A not be cut down to a period of 20 years from the date of the lease.

I think the principle to be deduced from these decisions is that, in order to prevent the acquisition of a statutory right to light under the Prescription Act, there must be an express written agreement, under which the actual enjoyment of light by a lessee is permissive throughout
B the whole of the term created by the lease. In the present case, the parcels in the lease of Aug. 29, 1899, contain words which confer on the lessee certain rights of way and user over Balfour Mews. These words are followed by a clause in the following terms :

C but without including any rights of light or other easements over other ground or premises and subject nevertheless to all rights and easements belonging to any adjacent property and subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans both as to height elevation extent and otherwise as shall or may be approved of by the ground landlord for the time being.

The habendum is expressed to be the subject to this provision. The
D lease contains a covenant by the lessee not to make any alteration in the construction, height or elevation of the demised premises without the previous written consent of the landlord. It is to be observed that there is in this lease an express exception out of the demise of any right to light in respect of the demised premises, a feature which is not present
E in any of the cases cited.

Having regard to the fact that the lessor was the owner of No. 13, Balfour Mews, and the owner of the reversion of No. 15, Balfour Mews, which he had already leased in Dec., 1897, the lessor himself had no easement of light in respect of No. 13, and was not in a position to grant
F any such easement affecting No. 15, Balfour Mews. The exception from the demise of any right to light over the last-mentioned property seems to me to establish that there was agreement between the lessor and lessee that the lessee was to have no absolute right to light under the lease. The exception is followed by these words :

G Subject to the adjacent buildings or any of them being at any time or times rebuilt or altered as to height elevation extent and otherwise.

Taken in conjunction with the exception, they appear to me to constitute a grant by the lessee to the lessor to build during the full term of the demise on the adjacent land, including No. 15, Balfour Mews, notwith-
H standing the effect of such building on the light to No. 13, Balfour Mews, and to constitute, together with the exception from the demise of any right to light, an agreement by the lessee of No. 13, Balfour Mews, that any enjoyment of light in respect of the premises demised to him was to be permissive only throughout the whole of the term. I therefore

hold that there is a sufficient agreement or consent in writing relating to the enjoyment of light in respect of No. 13, Balfour Mews, to satisfy the requirements of the proviso to sect. 3 of the Prescription Act and to prevent the acquisition by the plaintiff of any statutory right to light under that section. A

Solicitors: *Burton, Yeates & Hart* (for the plaintiff); *Holmes, Son & Pott* (for the defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

R. v. MINISTER OF TRANSPORT, *Ex parte* VALLIANT DIRECT COACHES, LTD. R. v. TRAFFIC COMMISSIONERS FOR THE SOUTH EASTERN TRAFFIC AREA, *Ex parte*, VALLIANT DIRECT COACHES, LTD. B

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift, and Macnaghten, JJ.), **December 16, 1936.**] C

Street Traffic—Road service licence—Express carriage—Backing of licence—Conditions—Conditions affecting licence in area in which it is granted—Jurisdiction of traffic commissioners—Jurisdiction of Minister of Transport on appeal—Road Traffic Act, 1930 (c. 43), ss. 72, 73, 81—Road Traffic Act, 1934 (c. 50), s. 40. D

The applicants had since 1926 provided a seasonal service of express carriages between London and the South Coast. In 1933 their licence was made subject to a provision that they should only issue return tickets for a journey from London and then back to London and a single ticket should only be issued in respect of an outward journey from London. In 1935 they secured the relaxation of these conditions by a proviso which allowed them to issue single tickets in the reverse direction subject to certain conditions, and their licence was so backed in the south eastern area. The Southern Railway Co. and Southdown Motor Services, Ltd., who ran services competing with applicants and who, though they had not opposed the grant of the original licence, had opposed the insertion of the proviso, appealed to the Minister of Transport against the inclusion of the proviso and the Minister ordered its deletion:— E

HELD: (i) no objection to the backing could be sustained on the ground that the conditions thereby imposed affected the scope or utility of the licence not in the south eastern area, but also elsewhere, including the area in which it was granted. F

(ii) the Southern Railway Co. and Southdown Motor Services, Ltd., were entitled under the Road Traffic Act, 1930, s. 81, as amended by the Road Traffic Act, 1934, s. 40, to appeal to the Minister. G

(iii) the order of the Minister was good, though it nullified an order made by the commissioners in the exercise of their discretion.

(iv) the Southern Railway Co., who were mainly concerned with rail traffic, had a right of appeal to the Minister, because under the Road Traffic Act, 1930, s. 72 (3) (d), the commissioners must have regard to the co-ordination of all forms of passenger transport, including transport by rail. H

[EDITORIAL NOTE.] This case considers in considerable detail and from many points of view the jurisdiction of the Minister of Transport upon an appeal from a

decision of traffic commissioners. It is clear from this decision that the appeal to the Minister is in the nature of a re-hearing, and it would appear that he is not bound by the exercise by the commissioners of a discretion vested in them. The Minister is at liberty to exercise that discretion in the opposite way. It is now clear that conditions can be attached to a licence by backing in an area other than that in which it was issued which will have the effect of curtailing its usefulness to the grantee in the area in which it was issued. In this respect, this decision follows the unreported case of *R. v. Yorkshire Traffic Comrs.*

AS TO ROAD SERVICE LICENCES, see HALSBURY, Supp., Street and Aerial Traffic, para. 611 (4), (5); and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 76b-76q.]

Cases referred to :

- (1) *R. v. Yorkshire Traffic Comrs.*, April, 1933. Unreported.
- (2) *R. v. Minister of Transport, Ex p. Upminster Services, Ltd.*, [1934] 1 K.B. 277; Digest Supp.
- (3) *Sharpe v. Wakefield*, [1891] A.C. 173; 42 Digest 621, 216.
- (4) *Mills v. London County Council*, [1925] 1 K.B. 213; 42 Digest 922, 171.

APPLICATION to make absolute three rules *nisi* granted on Feb. 21, 1936, upon the application of Valliant Direct Coaches, Ltd. The rules were as follow :

Rule *nisi* for a writ of *mandamus* against the Traffic Commissioners for the South Eastern Traffic Area to show cause why a writ of *mandamus* should not issue directed to them commanding them to hear and determine, pursuant to the statutes in that behalf, the application made on Dec. 11, 1935, for backings of certain licences of express carriages provided by Valliant Direct Coaches, Ltd.

Rule *nisi* for *certiorari* directed to the Traffic Commissioners for the South Eastern Traffic Area to show cause why a writ of *certiorari* should not issue directed to them to remove into this court an order made by them on Dec. 11, 1935, under the Road Traffic Act, 1930, s. 73, whereby certain conditions were attached to the backings of certain licences of services of express carriages provided by Valliant Direct Coaches, Ltd.

Rule *nisi* for *certiorari* directed to the Minister of Transport to show cause why a writ of *certiorari* should not issue directed to him to remove into this court an order made by him dated Oct. 25, 1935, under the Road Traffic Act, 1930, on the appeals of the Southern Railway Co., Ltd., and the Southdown Motor Services, Ltd., whereby the Minister ordered the Traffic Commissioners for the South Eastern Traffic Area to amend a condition attached by them when granting backings to road service licences in respect of certain services provided by the applicants.

Valliant Direct Coaches, Ltd., had carried on business since 1926, and owned a fleet of 31 motor-coaches. The services of express carriages provided by the company were summer seasonal services from London to Southsea, Bognor Regis, Brighton, Eastbourne, and Bournemouth, respectively. The company, together with other London carriers, maintained an efficient system of offices at the authorised car-parks and garages of the

various coastal towns, with inspectors in daily communication with a central London office to regulate their services. Arrangements were at all times adequate for the requirements and convenience of the public. The company served important suburban areas in West London, having feeder services and picking-up points for those areas. There is A no carrier in or near the areas served by the company by whose services the public can travel on single or period tickets from the coast. Persons desiring to return to the areas served by the company with single and period tickets (in the absence of any direct facility) have since 1933 by reason of the conditions then imposed been compelled to B travel on services terminating at Victoria or Waterloo.

The Minister of Transport, by a letter dated Sept. 6, 1933, directed traffic commissioners in manner following :

In considering any representations made to them as to the necessity for the imposition of restrictions upon the types of tickets to be issued on any particular service, the commissioners should have regard to the following among other matters : C

Period of operation of service.

Alternative facilities.

Frequency and convenience of timing.

Organisation available at terminals.

Possible necessity of duplication of vehicles and facilities therefor.

Amount of difference between single and double fares.

Previous history of service.

Special local conditions.

D

If, upon consideration of these and other relevant factors, the commissioners are satisfied on merits that a restriction on the types of tickets to be issued is desirable, they are free to impose such restriction, whatever be the period of operation of the service. Where, however, the arguments for and against restriction are nicely balanced, they will doubtless be more ready to allow freedom from restriction in the case of services run daily for a full six-monthly period than in the case of E services run for a shorter period.

The following conditions were in 1933 attached by the Commissioners of the South Eastern Traffic area to the backings of certain licences of services of express carriages provided by Valliant Direct Coaches, Ltd., under the Road Traffic Act, 1930, s. 73 : F

(15) A return ticket may only be issued and shall only be issued in respect of an outward journey from the metropolitan traffic area and a return journey into that area.

(16) A single ticket may only be issued and shall only be issued in respect of an outward journey from the metropolitan traffic area.

The company has not been allowed to carry passengers on single or G period return tickets for journeys from the coast without restriction since the year 1933. The company produced figures showing that a large number of passengers had been carried from the coast in 1933, with their destinations in London, so far as these could be traced. The tickets for these journeys, commencing at various coastal towns, were, H in most (but not all) cases, issued in London, and in many cases the company or its agents issued at the same time tickets for return journeys, commencing in London, to the same coastal towns. These were ordinary instances of persons travelling to holiday resorts and arranging to bring

back with them a friend or member of the family who was already there or who was travelling there independently. There was also produced a schedule, showing the total numbers of passengers carried by the company on the services concerned from 1931 to 1934. Conditions

- A similar to those set out above and imposed by the commissioners, and which first became effective in 1934, absolutely prohibited the company from carrying passengers on single or return tickets from the coast. These conditions, which were not conditions respecting the south-eastern traffic area only in that they prohibited the issuing of certain tickets in the metropolitan area, resulted in continual difficulty to and complaints from members of the public, and letters to the company showed insistent public demand to use its services on single journeys from the coast to the London suburbs.

- B On Feb. 18, 1935, Valliant Direct Coaches, Ltd., applied to the Commissioners of the South Eastern Traffic Area for backings of their licences and the Commissioners attached to the above-mentioned conditions the following proviso :

- D Provided that a single ticket for a journey in the reverse direction may be issued and used, subject to the following conditions: (i) The ticket shall only be issued by post from the head office in London of the licensee and after payment therefor has been received at that office. (ii) The ticket shall be issued direct to the person deciding to use it and not through an agent. (iii) The ticket shall bear on it before issue the date for which it is available.

- E Upon an appeal to the Minister of Transport by the Southern Railway Co. and Southdown Motor Services, Ltd., the Minister made an order on Oct. 25, 1935, deleting the above proviso. On Dec. 11, 1935, the applicants (Valliant Direct Coaches, Ltd.) again appeared before the commissioners for the purpose of obtaining backings of their licences, and the commissioners, having regard to the order of the Minister, felt themselves bound to refuse to include the above proviso. On Feb. 21, 1936, the above rules *nisi* were obtained by the applicants.

- F The effect of the deletion of the proviso was to benefit the services of the objectors, by transferring to them a portion of the traffic hitherto carried by the applicants, and by conferring on the objectors a virtual monopoly of all traffic originating at the coast. During the four or five summer months in which the applicants provided services, the volume of traffic was often so large that the objectors' services were already fully occupied. Another effect was that, although persons could travel from London to the coast on the company's services with single tickets, such persons could not return to London in the same way ; or that persons who had travelled to the coast by railway, or by any means other than the company's services, or who wished to travel to London on the company's services, were unable to do so. Such conditions or any similar conditions had not been applied to carriers providing services of express carriages in any other traffic areas in the United Kingdom,

including London services to Southend, Clacton, and Yarmouth, nor were they ordinarily applied in the South Eastern Traffic Area to the summer seasonal services of London carriers.

The Solicitor-General (Sir Terence O'Connor, K.C.), and Valentine Holmes showed cause on behalf of the Minister of Transport. A

Walter Monckton, K.C., and Sir Ronald Ross showed cause on behalf of the Southern Railway.

N. R. Fox-Andrews, and M. A. B. King-Hamilton showed cause on behalf of the Southdown Motor Services, Ltd.

R. P. Croom-Johnson, K.C., and B. M. Cloutman in support of the B rule.

The Solicitor-General (Sir Terence O'Connor, K.C.): The Act of 1930 was passed for the better regulation of road transport. The traffic commissioners grant or back licences, and it is a question whether one can go to either area through which a service runs to obtain the original C licence. The functions of the traffic commissioners are discretionary, and sect. 72 of the Act gives, in the widest possible terms, a discretion to the traffic commissioners either to grant or to refuse a licence. In this case, the traffic commissioners, in backing licences from London to the coast, have inserted provisos as to single tickets from the coast, D because the Minister of Transport has suggested that no singles should be issued from the coast to London. The merits were for the traffic commissioners to decide in their discretion. The traffic commissioners cannot impose any condition to take effect in another area, but they may, by varying, alter conditions in another area; because, where there E is such varying, there must often be an infringing. By sect. 78 (2), an operator may go to any traffic commissioners for an originating licence. Sect. 81 gives the Minister power on appeal to vary. That section gives the Minister a full discretionary power on review, but the Valliant Direct Coaches, Ltd., say that, on appeal, the Minister must not interfere with F the properly exercised discretion of the traffic commissioners. There are innumerable cases where the backing commissioners interfere with the licensing area. The traffic commissioners may impose what conditions they like, subject to the Minister of Transport. Neither the discretion of the Minister nor that of the traffic commissioners is in any way limited. G

Croom-Johnson, K.C.: The discretion of the traffic commissions under sect. 72 is not an absolute discretion, but a discretion which has to be exercised on relevant facts. The metropolitan traffic commissioner took into account relevant circumstances, and exercised his discretion under sect. 72. The backing commissioners have a discretion, not H absolute, but in the same ambit as the original commissioners. Both must act reasonably, and that is a matter for this court. In exercising their discretion, the backing commissioners must make conditions which are operative in their own area. Assuming the order was made by the

metropolitan traffic commissioner and a backing authority exercised its discretion rightly, somebody has a statutory right of appeal, and the Minister, in the exercise of his appellate jurisdiction, has no discretion unless expressly conferred, and, if the thing done was an exercise of discretion, the Minister of Transport has no right to interfere, save as to what discretion he may exercise as an appellate tribunal. The words :
 A "such an order as he thinks fit" mean a consequential order when, upon legal grounds, he allows an appeal. If the Minister has a discretion, his jurisdiction is to exercise this discretion, taking into account the same
 B matters as the traffic commissioners. The Act deals with road traffic, and, save where there is express reference to rail traffic, the Act does not deal with such traffic. Else why the necessity of sect. 72 (3) (d), dealing with co-ordination of transport by rail? The right view of
 C sect. 81 (2) is that the Minister on an appeal is engaged in a judicial function, and an appeal must not be a re-hearing. The Minister can only interfere with the exercise of the discretion of the traffic commissioners on legal grounds; if the other view is taken, the Minister would be complete master of the situation. The words : "the same discretion as the traffic commissioners" relate only to the form of order, and not
 D to the nature of his jurisdiction : see *Ex p. Upminster Services, Ltd.* (2), and *Sharpe v. Wakefield* (3). Assuming the Minister has a discretion, it is not an unlimited discretion, but it must be exercised reasonably : *Mills v. London County Council* (4). Unreasonable exercise is *ultra vires*. Sect. 72 lays down matters to which attention must be given. This must be
 E considered by the granting traffic commissioners when annexing conditions, and the power of variation is limited to their own areas. By sect. 73, the discretion of the backing commissioners is no wider than that of the commissioners granting the licence and such discretion must be reasonably exercised. If they consider extraneous matter, or fail to
 F consider matter which they should, their decision can be interfered with. If the Minister has no wider discretion than that of the traffic commissioners, it is necessary to examine the scope of their discretion, as provided by sect. 72. The Minister cannot impose a condition enabling
 G a service to run only with single tickets from London to the coast. This has the opposite effect from preventing wasteful competition, and such a condition does not come within sect. 72.

LORD HEWART, L.C.J. : These are three rules *nisi*, two of them being rules for writs of *certiorari*, and the other one being a rule for a writ of *mandamus*, the writs of *certiorari* to be directed to the Traffic Commissioners for the South Eastern Traffic Area and the Minister of Transport respectively, and the writ of *mandamus* to be directed to the Traffic Commissioners for the South Eastern Traffic Area.

The problem which these cases exhibit or conceal is enveloped in a

mass of material, but is, I think, capable of a comparatively brief statement. The problem arises out of the administration by the traffic commissioners, on the one hand, and by the Minister of Transport on the other hand, of the Road Traffic Act, 1930, in some of its most important and far-reaching provisions. The question arises historically A
out of an order made by the Minister of Transport on Oct. 25, 1935, under sect. 81 of the Road Traffic Act, 1930. In order to appreciate the effect of that order, and of the consequential order which was afterwards made, it is necessary very briefly to review the history of the B
licence obtained by the applicants for this rule, that is to say, the Valliant Direct Coaches, Ltd. This Act of Parliament having been passed into law in Aug., 1930, the applicants for this rule obtained certain road-service licences very shortly after the coming into operation of the Act, probably in the year 1931. It was then, or about that time, that what is called in the documents sometimes the original licence and sometimes C
the primary licence came into being. Such a licence had existence only for one year. It was capable of renewal, and it was also capable of variation, and after a time the licence (in the part of which we are concerned) came to contain a condition subject to which the company was entitled to issue, not only return tickets, but single tickets of a particular D
kind. The condition which was attached to the licence began by providing or determining that a single ticket may only be issued and shall only be issued in respect of an outward journey from the metropolitan traffic area, and then there followed a proviso. That proviso had the effect, subject to certain conditions, of enabling the company to do that E
which it was otherwise prevented from doing, namely, to issue single tickets back to the metropolitan traffic area. The result was that probably—it is not quite certain—about Jan., 1935, there was in existence a condition, not so much limited as amplified by a proviso, a proviso which in certain circumstances enabled single tickets F
to be issued for a journey back to London from the coast. That enabling proviso appeared to be objectionable, both to the Southern Railway Company and to a company called Southdown Motor Services, Ltd., and, accordingly, there followed an appeal against the condition, containing, as it did, that proviso. In the result, after an inquiry set on G
foot by the Minister of Transport and reported to him in a document dated Aug. 16., 1935, the Minister made an order dated Oct. 25, 1935, to the effect that the enabling proviso should be deleted, and, in consequence of that order, the Traffic Commissioners for the South Eastern Area on Dec. 11, 1935, made an order deleting the proviso, the result H
of which was that the company was prevented from carrying passengers on single tickets except in one direction, that is to say, from the metropolitan area to the coast, but not back from the coast to the metropolitan area; in other words, the Southern Railway Company and the South-

down Motor Services, Ltd., succeeded in that objection. The Minister upheld their contention, and the traffic commissioners proceeded to give effect to it.

So far as the rules *nisi* for *certiorari* are concerned, the contention is A that both the Minister of Transport and the Traffic Commissioners for the South Eastern Area, in doing what they did, usurped or exceeded their jurisdiction under the statute; usurped a jurisdiction which they had not; exceeded the jurisdiction which they had. A variety of grounds (the same grounds have been stated at least twice over in different B language) is alleged in support of that contention. It is, therefore, important to see what, so far as these matters are concerned, this comprehensive Act of Parliament (deliberately giving, as it does, a wide discretion both to the commissioners and to the Minister) provides. By sect. 73 (1), it is provided:

C A road service licence granted by the commissioners of any traffic area . . . may be backed [in a certain manner] . . . by the commissioners of another traffic area, and if so backed, shall in the area of the commissioners by whom the licence is backed have effect as if it were a road service licence granted by them.

Then follows the highly important subsection. (2), which is in these terms:

D The commissioners of any traffic area, on backing a road service licence, may as respects their area impose any condition which they might have imposed on granting the licence, or vary any condition attached to the licence by the commissioners by whom the licence was granted—

the subsection goes on to provide in the amplest possible manner—

E and all the provisions of this part of this Act as to applications for road service licences and the granting, refusal, suspension or revocation of such licences and matters connected therewith shall apply to the backing of road service licences, subject to the modification that references in the said provisions to the commissioners by whom the licence was granted shall be construed as references to the commissioners by whom the licence was backed.

Nobody can read that subsection with attention without observing F that if, where a continuous journey is contemplated, the commissioners of one traffic area give their backing to a licence granted elsewhere, only upon the terms that certain conditions are imposed, the effect may very well be—perhaps must be—that it will have an influence upon the scope of the licence, not only in the area in which it is backed, G but also, by consequence, in the area in which it was originally granted. Apparently a question arose whether the imposition of a condition at the time of the backing could lawfully have that effect; in other words, whether a condition likely to have that effect could lawfully be imposed, and that question was fought out in a case which is not reported, but H which is evidently familiar to learned counsel on both sides in the present argument: *R. v. Yorkshire Traffic Commissioners* (1), heard in this court in Apr., 1933, and heard in the Court of Appeal in October of the same year, where the judgment of this court was affirmed. The effect of that judgment is that this subsection of sect. 73, rightly construed, does

enable the commissioners of a traffic area, where the backing of a licence is asked for and given, to impose a condition which affects the extent or dimensions or nature of the licence, not only in their own area, but also, consequentially, in the area in which it is granted.

A part, and no small part, of the grounds upon which it is alleged A that the Minister himself and the traffic commissioners, in pursuance of the course that he took, usurped or exceeded jurisdiction, is that the effect of deleting the enabling proviso to the condition which the Valliant Direct Coaches, Ltd., had secured, reduced the scope and utility of the licence, not only in the area of the south eastern traffic commissioners B themselves, but also elsewhere. In my opinion, that point and everything connected with that point has been determined by decisions already given, even if the meaning of the subsection itself were not sufficiently apparent. There follows in the statute, after certain other sections, some general provisions in sections beginning with sect. 78, C subject. 2 of which provides :

An application for a road service licence shall be made to any commissioners within whose area the proposed route or any part thereof is situate.

Then comes the important section, sect. 81. Sect. 81 is dealing with D appeals to the Minister in connection with public service vehicle licences, road service licences, and otherwise. The first subsection provides as follows :

Any person who (b) being a local authority which, or a person providing transport facilities who, has opposed the grant of a road service licence, is aggrieved by the grant thereof or by any condition or by any variation of the conditions attached thereto ; or . . . may within the prescribed time and in the prescribed manner appeal to the Minister. E

By subsect. (2) it is provided :

On any such appeal, the Minister shall have power to make such order as he thinks fit (including an order revoking a licence), and [these are important words] F any such order shall be binding upon the commissioners or certifying officer.

This case has to do, not with any local authority, but it has to do with artificial persons known to the law, limited companies providing transport facilities, that say that they are aggrieved by the grant of G the licence, or by some condition, or variation of condition. Nobody suggests for a moment that either the Southern Railway Company or the Southdown Motor Services, Ltd., fails to come within the words "a person providing transport facilities," but it is said that the other of the two conditions is not by either of them fulfilled, that is to say, H the condition beginning with the words, "has opposed the grant of a road service licence." It has been thought fit to explain—and conceivably, on one view of the matter, to extend—the meaning of that expression "has opposed the grant" by subsequent legislation, which, however,

took effect at a time antecedent to the genesis of the present controversy. By the Road Traffic Act, 1934, s. 40, and Sched. 3, it is provided :

Sect. 81.—In subsect. (1) [of the Act of 1930], in para. (b), after the word “ grant ” where that word first occurs, there shall be inserted the words “ or variation.”

A So that, at all material times for the purposes of the present case, these words read :

a person providing transport facilities who has opposed the grant or variation of a road service licence.

B It was suggested—faintly suggested, as it seemed to me—on the part of the applicants for the rule, that, in that amending provision, the term “ variation ” had a special and limited meaning. I cannot follow that suggestion. The word “ variation ” is all over sect. 81, and I cannot imagine that the word “ variation ” is used in two different senses within the limits of the same subsection or different subsections of the same section. We have, for example, in sect. 81 (1) (b), the words :

a person . . . who, has opposed the grant [now “ the grant or variation ”] of a road service licence, is aggrieved by the grant thereof or by any condition or by any variation of the conditions attached thereto.

D And, in the next paragraph of the same subsection :

or being the holder of a public service vehicle licence or road service licence, is aggrieved at the revocation or suspension thereof, by the commissioners or by any variation of the conditions attached thereto.

E It seems to me, therefore, looking at the plain words of this subsection, interpreted or extended, as they are, by the amendment to be found in the Act of 1934, that it is not useful to attempt to draw a distinction between those who oppose the original grant of a road service licence on the one hand, and those who oppose the variation of the conditions of a licence on the other hand. It seems to me that this railway company and the Southdown Motor Services, Ltd., are, for the purposes of appeal, upon the same footing as that which they would have had if they had opposed the grant of what is called the primary or the original licence. What they did oppose was the grant of an enabling condition, which had the effect of enlarging the circumstances in which single tickets could be issued by the Valliant Direct Coaches, Ltd. So far, therefore, as the parties are concerned, I think that there is nothing in the contention that these parties, or either of them, could not properly appeal to the Minister.

H But it is said that, even if they could properly appeal, they could not rightly appeal so as to get rid of that part of the condition which the Valliant Direct Coaches, Ltd., had got with reference to the issue of single tickets. A long series of grounds is urged, or, at any rate, is enumerated, in support of that proposition, and we have listened with the greatest attention to the elaborate argument that Mr. Croom-Johnson has advanced in support of those grounds. To my mind, the

grounds are unconvincing. It is said, for example, with regard to the Minister of Transport, that he had no jurisdiction to make the order because it results in a condition which the south eastern traffic commissioners themselves have no power to impose. *Cadit quaestio* if, as is the fact, the south eastern traffic commissioners themselves had power to impose the condition in question. The second ground is really a statement in another form of that ground. The words are :

in that it results in a condition the effect of which is not limited to the south eastern traffic area.

That is true, but it is not requisite that the effect of the condition should be limited to the south eastern traffic area. Then follow contentions that the condition, that is to say, the condition stripped of the enabling proviso, "results in conditions which are in themselves inconsistent and unreasonable," and "in a condition which conflicts with the company's obligations under its primary licence." Again, it is difficult to find any real substance in those contentions, or either of them. Then, it is said that the order of the Minister :

In that it results in conditions which, in so far as they conflict with the prosecutors' obligations as common carriers of passengers, are not authorised by the Road Traffic Act, 1930,

and :

in that he thereby ordered the said commissioners [by this order] to amend a condition attached by them to backings in the lawful exercise of their discretion.

With all due respect to the authors of these grounds, there appears to be no such objection. As for the contention of the effect of the Minister's order as to cause an amendment of a condition which the commissioners, in the exercise of their discretion, had imposed, or, to put it in a more exact and intelligible form, to reduce to the narrower dimensions a condition which the commissioners, in their discretion, had permitted at large, it seems to me to be nothing to the point. It is precisely one of the necessary duties which the Minister has to perform.

Finally, it is said that the Southern Railway Company and the South-down Motor Services, Ltd., were not objectors within the meaning of sect. 81—a point which has already been dealt with—and that the Southern Railway Company were not persons already providing transport facilities along, or near, the routes, or any part thereof, within the meaning of sect. 72 (3). The answer to that last ground is the mere geography, and it is to be observed that sect. 72 (3), in which is contained some, at any rate, of the matters to which the commissioners are directed to have regard, includes sect. 72 (3) (d) :

the needs of the area as a whole in relation to traffic (including the provision of adequate, suitable and efficient services, the elimination of unnecessary services and the provision of unremunerative services) and the co-ordination of all forms of passenger transport, including transport by rail.

Looking at those grounds, I think that that ground also is devoid of substance. It is further alleged that the Minister failed to exercise the discretion conferred upon him by sect. 81, and allowed his discretion to be fettered, and that he took into consideration irrelevant and extraneous matters. So far as I apprehend the meaning of those contentions, it comes to this, that the Minister was not prepared, again and again, to travel over the same ground, and ascertain afresh whether there was good reason for a decision at which he had already, in proper circumstances, and on sufficient material, arrived. So much for the rule *nisi* for *certiorari* to be directed to the Minister of Transport.

So far as the Traffic Commissioners for the South Eastern Area are concerned, there is nothing in the grounds alleged in regard to them which is not also contained, and has not already been dealt with, in the case of the rule *nisi* for *certiorari* to be issued to the Minister.

With regard to the rule *nisi* for *mandamus* which it is proposed should be issued to the commissioners alone, that is a *mandamus* to command them to hear and determine, pursuant to the statutes in that behalf, the applications made on Dec. 11, 1935, for backings of certain licences of express carriages provided by the Valliant Direct Coaches, Ltd.; in other words, to hear those applications. Apart from any objection to that part of the proviso, or the condition which has the effect of enabling the limited company to issue single tickets for journeys back from the coast to London, the answer to that request for a *mandamus* is twofold: first, that the commissioners have duly heard and determined; secondly, that the statutes do not require them to consider that application stripped, or relieved of, the objection to the enabling part of the proviso.

For these reasons it appears to me that these rules, and each of them, ought to be discharged.

SWIFT, J.: I agree, and have nothing to add.

MACNAGHTEN, J.: I agree.

Rules discharged with costs in each instance.

Solicitors: *Treasury Solicitor* (for the Minister of Transport); *W. Bishop* (for the Southern Railway Company); *Sydney Morse & Co.* (for the Southdown Motor Services, Ltd.); *J. R. Cort Bathurst* (for the Valliant Direct Coaches, Ltd.).

[Reported by HENRY WESTLAKE, ESQ., Barrister-at-Law.]

NEWPORT *v.* POUGHHER.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
January 11, 1937.]

Partnership—Dissolution—Appointment of receiver—Fund in court—Partner-ship insolvent—Charging orders on fund in court—Priority. A

The fund in court to the credit of a partnership action was insufficient to pay the creditors in full. Certain creditors of the partnership obtained a charging order on the fund in their favour in the form settled in *Kewney v. Attrill* (1). The only question argued was whether the charging order gave to the creditors who had obtained it a priority over the general body of creditors of the partnership:— B

HELD: the *Kewney v. Attrill* (1) order created a charge on the fund in favour of the creditors, and gave them priority over the general body of creditors.

[EDITORIAL NOTE. The question at issue was whether a judgment creditor who had obtained an order in the form settled in *Kewney v. Attrill* (1) was entitled to any priority over the general creditors. Although the main purpose and object of such an order is to prevent an immediate execution and sale by the judgment creditor and allow the partnership assets to be realised in due course by the receiver, the effect of such an order is to give the judgment creditor a charge on the net assets of the partnership and thus obtain priority over the general body of creditors. The origin of the contrary view, which was upheld by EVE, J., in the lower court, is fully discussed, and the interlocutory observation of KAY, J., in *Kewney v. Attrill* (1) is explained. C

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 24, Receivers, pp. 382, 383, para. 719; AND FOR CASES, see DIGEST, Vol. 36, p. 489, Nos. 1540-1545.] D

Cases referred to: E

- (1) *Kewney v. Attrill* (1886), 34 Ch. D. 345; 56 L.J. Ch. 448; 55 L.T. 805; 36 Digest 489, 1540.
- (2) *Mitchell v. Weise, Ex p. Friedheim*, [1892] W.N. 139; 36 Digest 489, 1545.
- (3) *Ridd v. Thorne*, [1902] 2 Ch. 344; 36 Digest 489, 1543.
- (4) *Brereton v. Edwards* (1888), 21 Q.B.D. 488; 21 Digest 653, 2314. F
- (5) *Brand v. Sandground* (1901), 85 L.T. 517; 36 Digest 489, 1542.

APPEAL by two judgment creditors against a judgment given by EVE, J., on Nov. 4, 1936, and reported in [1936] 3 All E.R. 674.

Messrs. Newport & Pougher were partners. In Feb., 1933, Newport G brought an action for dissolution of partnership, and on Feb. 7 BENNETT, J., made an order appointing a receiver of the partnership assets and ordering dissolution, an account and an inquiry. On June 23, 1933, Pougher was adjudicated bankrupt. In July, 1935, the receiver had in his hands £13 1s. in cash, and the rest of the partnership assets, H in value over £1,000, were in court. Messrs. Mills and Evill, solicitors, obtained judgment against the partnership on Mar. 8, 1935, for £139 10s. 9d., the amount of a bill of costs, and on July 17, 1935, BENNETT, J., made a charging order in their favour in the following form,

which has come to be known, and was referred to by counsel throughout the hearing, as a *Kewney v. Attrill* (1) order :

A This court doth declare that the applicants are entitled to a charge for the amount of their judgment debt, interest and costs recovered against the plaintiff and the defendant John Henry Poughner by the said judgment dated Mar. 8, 1935, and upon the assets which now are in or may hereafter come to the hands of Charles Latham the receiver appointed in this action, the applicants by their counsel submitting that such charge shall be dealt with in such manner as this court shall direct, the intention of this court being to preserve to the applicants such legal rights as they would have had if the sheriff had seized under the execution and sold this day.

B On July 31, 1935, Mr. J. J. McIntyre, solicitor for Mr. Newport, and another solicitor who had acted for Mr. Poughner, obtained charging orders on the fund in court for their taxed bills of costs under the Solicitors Act, 1932, s. 69. On Nov. 14, 1935, Mr. McIntyre presented a petition asking for payment of his taxed costs out of the money in court. At the hearing on Nov. 4, 1936, the only question was whether judgment C creditors obtain, from an order in the *Kewney v. Attrill* (1) form, priority over the general body of creditors. EVE, J., held that the obtaining of a *Kewney v. Attrill* (1) order gives no priority to the creditor obtaining it over the general body of creditors; but that the charging orders obtained under the Solicitors Act, 1932, gave priority. Messrs. Mills and Evill D appealed.

J. Norman Daynes, K.C., and *J. A. Brightman* for the appellants.

E. Milner Holland for Dulcetto-Polyphon, Ltd., representative unsecured creditors of the partnership firm.

Daynes, K.C. : The *Kewney v. Attrill* (1) order confers priority. E General creditors have no *locus standi*, only the right to share in the assets after the charging order has been satisfied. The order protects the trustee in bankruptcy against the claim of the general creditors to distribution *pari passu*. A cause of action against the firm arose before dissolution, and *a fortiori* before the bankruptcy. The *Kewney v. Attrill* (1) F order entitles the judgment creditor after dissolution to sue the firm on a cause of action which arose before the dissolution. But for the existence of a receiver, execution could have been levied at common law on Mar. 8, 1935. In *Kewney v. Attrill* (1), after judgment had been pronounced in a Chancery action for dissolution of partnership and a receiver had been G appointed, a creditor obtained judgment in the Queen's Bench Division for the amount of his debt and costs ; on an application by the judgment creditor an order was made giving him a charge for his debt and costs on all bankruptcy moneys come or coming to the receiver, the creditor undertaking to deal with the charge according to the order of the court, H the intention of the court being to preserve to him all the rights he would have had if he had issued execution and the sheriff had seized and sold the assets on the day the application was made.

LORD WRIGHT, M.R. : The difference here is that there is a supervening bankruptcy of one partner.

Daynes, K.C.: In the report of *Kewney v. Attrill* (1) in the LAW REPORTS, KAY, J., is reported to have made the following interlocutory observation, at p. 346 :

By the appointment of a receiver the court aims at equality amongst the creditors. If I give you leave [to issue execution] it must be on your undertaking to hold the proceeds and deal with them in accordance with any order the court may make. A

This observation is not reported in the LAW TIMES REPORTS or LAW JOURNAL REPORTS. The courts used to give a charge without any qualification ; it is only since *Kewney v. Attrill* (1) that the qualification has crept in. B

In *Ridd v. Thorne* (3), in a partnership action in which a receiver had been appointed, a judgment creditor of the firm obtained an order in the form of the order in *Kewney v. Attrill* (1), giving him a charge for his debt and costs on the assets in, or to come into, the hands of the receiver, the creditor undertaking to deal with the charge according to the order of the court. Upon application by the solicitor of the plaintiff in the action for a charging order for his costs under the Solicitors Act, 1830, s. 28, in priority to the judgment creditor, JOYCE, J., held that the solicitor was entitled to succeed ; *semble*, an order in the form of *Kewney v. Attrill* (1) only operates as a charge as among creditors of the partnership themselves, or as against the several partners of the firm. In that case the learned judge regarded the order as intending to give a charge as amongst the creditors of the partnership themselves, for the protection of the judgment creditor. In *Brereton v. Edwards* (4), LORD ESHER, M.R., at p. 494, said that the court tries to help the judgment creditor, and stated the general law clearly. [Counsel also referred to *Mitchell v. Weise*, *Ex p. Friedheim* (2) and *Brand v. Sandground* (5)]. C D E

Holland : The foundation of the argument in *Kewney v. Attrill* (1) was that the client's rights were endangered by the possibility of the bankruptcy of the firm and a joint adjudication. It was said that if they did not take the step of obtaining joint adjudication they would lose their priority. The object of the *Kewney v. Attrill* (1) order is to preserve the rights which would otherwise be lost. The interlocutory remark of KAY, J., reported in the LAW REPORTS is inconsistent with the last sentence of his judgment. His Lordship is reported in the LAW JOURNAL REPORTS as saying in his judgment at p. 448 : F G

I do not intend to decide that the applicants will be entitled to any preferential payment in the administration of the partnership assets ; but I will give them a charge for their judgment debt. . . .

On a literal reading of the last sentence of his judgment, if the sheriff had seized and sold on the day of the order those assets would not have been available for the general body of creditors or for any other creditors. The judgment must, however, be read as a whole. The two observations are only consistent if they are read as meaning that the learned judge H

does not intend to decide that the applicants have any priority in the administration of the partnership assets, but to preserve to them such legal rights as they would have had if the sheriff had seized and sold on that day. The purpose of his order was to protect these creditors against the trustee in bankruptcy on a joint adjudication against the firm, but he did not intend to confer any preference upon the applicants as against the other creditors. If there are assets in the hands of the receiver, it is true that the court may give leave to issue execution upon them, and then the other creditors will lose any rights they had against those assets. In the present case, however, the application is made for payment out of a fund in court, which the court has ultimately to administer. The intention of a *Kewney v. Attrill* (1) order is to protect a judgment creditor from the result which would ensue if, having obtained his judgment, he did not proceed to execution and an adjudication in bankruptcy supervened: he would clearly lose any benefit he might derive from his judgment. If, however, the order is to have the effect of giving priority as between himself and the other creditors without any supervening bankruptcy of the firm, then it will not be right to make a *Kewney v. Attrill* (1) order *ex parte*. The court is not considering the assets of a partnership outside its control, but assets in the hands of the court which are to be distributed at the conclusion of the action. It would have been impossible in the present case to give leave to issue execution.

LORD WRIGHT, M.R. : This is an appeal from a portion of an order of EVE, J. With the greatest respect to that learned judge, I feel myself unable to come to the conclusion at which he has arrived, and if it were not that he has come to a different conclusion, and if it were not for the circumstance that a good deal of unnecessary confusion seems to be imported into these questions by forms of orders which are open to some criticism, I should have thought it was a reasonably simple case. The sole question here is whether the present appellants, Messrs. Mills and Evill, are entitled to have a relative priority, which EVE, J., has refused to give to them, as compared with the general body of the creditors of the partnership in question.

The proceedings arise out of a partnership action. There was a partnership, the name of which, I suppose, was Newport & Poughner, and one of the partners, Mr. Newport, commenced a partnership action in Feb., 1933, and on Feb. 7, 1933, BENNETT, J., made the ordinary order in that action appointing Mr. Latham receiver to "collect get in and receive the debts now due and owing, and other assets property or effects belonging to the partnership business" which these two parties, the plaintiff and the defendant, had been carrying on. In June, 1933, after the proceedings, which asked for a dissolution, Mr. Poughner was

adjudicated bankrupt. The receiver collected the assets, and in July, 1935, the position was that the whole of the money was in court, except the sum of £13 ls., which was actually left in the hands of the receiver at the material date. In that state of things the present appellants, Messrs. Mills and Evill, applied to BENNETT, J., for an order, which I take it was in the ordinary form, that is to say, they asked for leave to levy execution, or for an order for payment out to them of the amount of their debt for which they had recovered judgment in Mar., 1935. On July 17, 1935, BENNETT, J., made an order in this form :

This court doth declare that the applicants are entitled to a charge for the amount of their judgment debt, interest and costs recovered against the plaintiff and the defendant John Henry Pougher by the said judgment dated Mar. 8, 1935, and upon the assets which now are in or may hereafter come to the hands of Charles Latham the receiver appointed in this action, the applicants by their counsel submitting that such charge shall be dealt with in such manner as this court shall direct, the intention of this court being to preserve to the applicants such legal rights as they would have had if the sheriff had seized under the execution and sold this day.

I reserve for a moment some observations which I desire to make on the form of that order. The matter came before EVE, J., in Nov., 1936, and in that further application, in which the learned judge made general directions as to the disposal of the assets of the partnership, he first dealt with the claims of two solicitors, Mr. Hemming and Mr. McIntyre, who claimed under the Solicitors Act, 1932, s. 69, to have a charging order in their favour. The learned judge made an order accordingly giving them the prior charge to which they were entitled under sect. 69, and there is no question in these proceedings or in any other proceedings that that charge would rank in priority to such a charge which has been described as in the nature of salary. No question arises as to that. There is a small item of a Crown debt, a preferential claim for income tax, £2 10s. 6d., and no question, so far as I know, arises about that, but there are a great number of general creditors, and there was added to these proceedings before EVE, J., a representative of the general body of creditors, so that the question now at issue might be determined as between the present appellants and the general body of creditors. EVE, J., has held that, notwithstanding the order of BENNETT, J., the present appellants have no claim at all to rank in priority to the general body of creditors, and it is against that order that this appeal is brought. The learned judge deals with the matter very shortly. He says (p. 675) :

I find nothing in any of the cases I have looked into to change the conclusion at which I arrived before the vacation, namely, that the obtaining of a *Kewney v. Attrill* (1) order [that seems to be a stereotyped form for describing such an order as BENNETT, J., made in this case] gives no priority to the creditor obtaining it over the general body of creditors.

It is there, with the greatest respect, that I find myself taking a different view from that of the learned judge. The case of *Kewney v. Attrill* (1)

contains a judgment of KAY, J., and also certain interlocutory observations which he is reported to have made, if one looks at the report in the LAW REPORTS. The reports in the LAW TIMES and in the LAW JOURNAL, to which we have been referred, differ in some respects, but, as I understand them, not in principle. KAY, J., is first reported as having said by way of interlocutory observation (I am now reading from the LAW REPORTS, p. 346) :

By the appointment of a receiver the court aims at equality amongst the creditors. If I give you leave [*i.e.*, to issue execution] it must be on your undertaking to hold the proceeds and deal with them in accordance with any order the court may make.

The application before the learned judge was this : The judgment creditors had applied for leave to issue execution under their judgment against the partnership assets in the hands of the receiver, and it had been ordered that the application should stand over until the partnership assets had been ascertained. That was done on Dec. 7. The application in which KAY, J., pronounced on Dec. 21, a fortnight afterwards, was that the order adjourning the proceedings should be discharged, and that they might be at liberty to issue execution, that means forthwith, against the partnership assets in the hands of the receiver, or that the receiver should pay them their judgment debt and costs out of the assets. That obviously presupposes that, in the interval of time between Dec. 7 and Dec. 21, the partnership assets had been ascertained, and that there was no reason for any further delay. Mr. Alexander, arguing for the applicants, complained that the delay was endangering their rights, because if the partners were adjudicated bankrupt, they might lose their priority. At that time, apparently, no act of bankruptcy had been committed. It is with reference to that, that, first of all, KAY, J., says :

By the appointment of a receiver the court aims at equality amongst the creditors.

That is a general proposition which would, I suppose, not be disputed. Stated very broadly and generally, the receiver is appointed in order that the court may keep its hands upon the assets in order to deal with them. But there is some difficulty, to my mind, in seeing exactly how far that can be literally applied, because it is perfectly clear, I take it, that, in a partnership action such as that in question, the court is not concerned with administering the property in the interests of the creditors ; it is dealing with the property as between the partners themselves. There is that interlocutory observation, which is not reported in either the LAW JOURNAL report or the LAW TIMES report, and to which I find it a little difficult to give a precise meaning or effect. What the learned judge is saying is : “ If I give you, as you ask, immediate leave to levy execution against the partnership assets, or if I make an immediate order that the receiver should pay them to you, that must be subject to an under-

taking." Then Mr. Whitaker, for the partners, says: "It would save expense if the applicants took a charge on the assets, instead of leave to issue execution." That was obviously a proposal alternative to the idea of issuing execution at once, and subject to an undertaking. Then KAY, J., says at p. 346 :

Very well—if there is a bankruptcy the trustee in bankruptcy will take subject to prior equities and therefore subject to a charge. I give the applicants, the judgment creditors, a charge now on the moneys which are in the hands of or may be taken possession of by the receiver, and they must undertake to deal with the charge according to the order of the court. The charge will be for the judgment debt and costs and interest at 4 per cent., and the costs in chambers and here.

I stop there for a moment. What the learned judge is saying is this: "If I give you a charge, the trustee in bankruptcy will take subject to prior equities, and, therefore, subject to a charge." I think the learned judge means: "The charge which I am now giving to you will involve a priority as against the trustee in bankruptcy—that is, as against the general body of creditors—but I am going to give you that charge." The ordinary form of order as drawn up is in this form :

This court doth declare that the said A. B. is entitled to a charge for the amount of his judgment debt . . . upon the assets which now are in or may hereafter come to the hands of the receiver in this action.

And that is all the effective part of the judgment of KAY, J., as I read it, in the case before him. When I come to the order in the present case which BENNETT, J., has made, in which he seems to follow so far the language which is set out in SETON ON JUDGMENTS AND ORDERS, 7th Edn., Vol. 1, p. 471, the exact formula :

Upon the assets which now are in or may hereafter come to the hands of Charles Latham the receiver.

He seems to have overlooked, and does not deal with, the circumstance that, at that time, except for the sum of £13 ls., all the assets were in court, and not in the hands of the receiver at all. The order as drawn up now, according to the precedent in SETON to which I have referred, goes on in a very curious manner, which appears to me to be very unusual. It says this :

The intention of this court being to preserve to the said A. B. such legal rights as he would have had if the sheriff had seized under the execution and sold on this day.

That seems to take and to put into the order the language of KAY, J., at pp. 346, 347, which is :

The intention of the court is to preserve to the applicants all the rights which they would have had if they had issued execution and the sheriff had seized and sold the assets to-day.

That, no doubt, is a correct statement of what KAY, J., had in mind, and it may well be a good working rule for the direction of any other court

which has to deal with a similar problem, that is to say, a problem of what has to be done with the disposal of a fund representing partnership assets which is either in the hands of the receiver or in the hands of the court. In either event, the court wishes to secure, if they have not
A thought fit to order immediate payment out, or immediate execution, as they might do, that the fund must be dealt with according to the order of the court, and therefore you have the essential words which are found in the order in SETON :

Submitting that such charge shall be dealt with in such manner as the judge
B shall direct,

or, in the words of KAY, J., at p. 346 :

They must undertake to deal with the charge according to the order of the court.

It seems to me that these final words ought not to form any part of the operative order. The position is that in a partnership action of this
C nature where there is no bankruptcy at all, the rights of the judgment creditor are not affected in any respect, except that he has to obey the instructions, and obtain the leave, of the court in which the action is proceeding. Equally, the bankruptcy of one partner will make no
D difference, but the mere fact of the receiver being appointed puts a certain responsibility on the court in the disposal of the moneys in the partnership assets, and it is to give effect to that responsibility that the rule was established that execution is not to be levied without leave, or that the moneys in the hands of the receiver are not to be paid out
E without the leave of the court, and, in doing so, they may impose this condition, and will impose this condition, if they think it fit and proper to do so. It is quite obvious that BENNETT, J., for instance, in making the order that he did, limiting it to a charge and not ordering an immediate payment out, was not considering the general position of the
F estate or the various rights, and the possibility of preferential rights ; he was not administering the estate in any sense ; he was merely making a charge, the exact effect of which might require consideration in a later proceeding, as indeed in the application to EVE, J. EVE, J., when the matter came before him, was able to give effect to the preferential rights
G of the solicitors under their charging orders. But I think it is quite wrong to say that a charging order such as BENNETT, J. made in the present case does not give a priority to the person who gets the charge as against the general body of the creditors, and if I may refer again to the judgment of KAY, J., I think it is quite clear that he is intending
H to give a priority which is, as far as it was necessary for him to go at that stage, in favour of the judgment creditors.

I think the appeal ought to be allowed.

ROMER, L.J. : I agree. I think the difficulty that has arisen in the

present case is largely due to the fact that in the LAW REPORTS an interlocutory observation is attributed to KAY, J., I think, erroneously ; that is to say, I think the learned reporter, whoever he was, must have misunderstood what fell from that learned judge's lips, because the observation does not appear in the report either in the LAW JOURNAL A or in the LAW TIMES. The observation was this at p. 346 :

By the appointment of a receiver [KAY, J. was referring to the appointment of a receiver in an action between partners for dissolution] the court aims at equality amongst the creditors.

The true position of creditors in an action for dissolution between partners B was correctly expressed, as one would imagine it to be, by CHITTY, J., in the case of *Mitchell v. Weise, Ex p. Friedheim* (2). CHITTY, J., said at p. 139 :

A suit between partners for winding up the partnership business was a suit C between the parties themselves in their own individual rights, and that the creditors of the firm had no interest whatever in such action.

And then he points out the difference between such an action and proceedings to wind up a company. He might also, of course, have referred to the difference between such an action and proceedings for the administration of the estate of a deceased person. Neither have the creditors D any *locus standi* in any such action for dissolution, but they are not in any way affected by the decree for dissolution itself, and, after the decree for dissolution, a creditor of the partnership is entitled to pursue the partners to judgment and, unless a receiver of the partnership assets has been appointed, he can proceed to levy execution on the partnership assets, and E of course, where the court has appointed a receiver, then nobody can touch the assets of which the receiver has been appointed except with the leave of the court, and the court will in certain cases grant leave notwithstanding the appointment of a receiver to issue execution. That is very often an inconvenient order to make, and a preferable form is to direct F the receiver to pay the execution creditor out of net assets in his hands, that is, out of moneys given into his hands representing the proceeds of sale, or collection of the assets after deducting costs of realisation and the remuneration of the receiver, and so forth. Another alternative is also open to the court, which is the alternative which was adopted by G KAY, J., in the case of *Kewney v. Attrill* (1), and that is to give the judgment creditor a charge upon the net partnership assets. Whichever of the two alternatives giving leave to issue execution be adopted, the object is the same in both ; it is to give the judgment creditor priority H over creditors who have not proceeded to judgment, and, in the case of the second alternative being adopted, the judgment very frequently contains, as it does contain in the present case, a declaration that the intention of the court is to preserve to the applicants all the rights which they would have had if they had issued execution, and the sheriff had

seized and sold the goods as on the day of the order. But, as pointed out by Mr. Holland in his argument just now, that does not correctly express the intention of the court, because the court would not, for instance, deprive the receiver of his remuneration, or make the costs of realisation of the assets fall upon the receiver, or the parties to the action; nor, as appears from authorities to which our attention has been called, does the giving of a charge prevent the court from giving a solicitor a charging order in respect of his costs incurred in the action. Therefore, I agree that in future it would be very much better that those words referring to the intention of the court in making the order should be omitted, and that the intention of the court should be ascertained from the very words of the order, which will give to the applicant a charge upon the assets of the partnership, whether the assets are in the hands of the receiver or in court, or otherwise, and that the applicant should give the undertaking, which is embodied always in these orders, only to deal with the charge given him by the order subject to the direction of the court.

For these reasons, in addition to those which LORD WRIGHT, M.R., has given, I agree that this appeal must succeed.

GREENE, L.J. : I agree.

Appeal allowed with costs. Order made : The payment schedule to be amended so as to direct, after the preferential payments, the payment of the applicants' judgment debt, interest and costs, as secured by the order of July 17, 1935 ; remainder of the schedule (claims of unsecured creditors) to be omitted.

Solicitors : Mills, Lockyer, Church & Evill (for the appellants) ; A. E. Samuels & Co. (for the representative unsecured creditors).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

Re DRAKE SETTLEMENT TRUSTS, *WILSON v. DRAKE*.[CHANCERY DIVISION (Bennett, J.), **November 4, 5, 6, December 21, 1936.**]

Estate and other Death Duties—Succession Duty—Predecessor—Settlement by party with defeasible estate and party with contingent interest subject thereto—Succession Duty Act, 1853 (c. 51), s. 2. A

By the combined effect of a settlement and a will, E. T. T. D. in 1915 became entitled to certain real property absolutely, should he survive the Great War, and, if he failed so to survive, such property went to G. P. T. D. absolutely, subject only to an annuity of £1,200 to the widow of E. T. T. D. In 1917, E. T. T. D., being in want of money, agreed with G. P. T. D. that certain of these hereditaments should be settled, subject to certain prior charges, upon E. T. T. D. for life, after his death to secure an annuity of £1,200 to the surviving wife of E. T. T. D., subject thereto to secure portions for the younger children of E. T. T. D., subject thereto for the first and other sons of E. T. T. D. successively in tail male with remainder to G. P. T. D. for life and then to his sons successively in tail male. In consideration of the settlement, G. P. T. D. was to release his contingent interest in other hereditaments subject to the will. A settlement in pursuance of the agreement of 1917 was executed in 1921, the grantors being both E. T. T. D. and G. P. T. D., and upon the death of E. T. T. D. in 1933, without sons, the property passed to T. T. D., the eldest son of G. P. T. D., under the last limitation, subject to the annuity for the widow and portions for the daughter of E. T. T. D. The question then arose whether, for the purposes of the payment of succession duty, E. T. T. D. was the sole predecessor of the beneficiaries or whether E. T. T. D. and G. P. T. D. were joint predecessors :— B

HELD : since, before his death, E. T. T. D. had become indefeasibly entitled to the estates settled and the contingent interest of G. P. T. D. had determined, and also since the interests of the beneficiaries would have been the same had E. T. T. D. been the only grantor in the settlement of 1921, E. T. T. D. was the sole predecessor of the beneficiaries. C

[EDITORIAL NOTE.] The principle laid down in the House of Lords cases referred to in the judgment is here applied. Although one party to the settlement had a contingent interest at the date of the settlement, the interests of the beneficiaries in fact arose out of the other party's estate, since the contingent interest determined before the limitations of the settlement took effect. D

AS TO PREDECESSOR, see HALSBURY, Hailsham Edn., Vol. 13, pp. 352-354, paras. 386-389; and FOR CASES, see DIGEST, Vol. 21, pp. 91-95, Nos. 667-699.] E

Cases referred to : F

- (1) *Braybrooke (Lord) v. A.-G.* (1861), 9 H.L. Cas. 150; 21 Digest 94, 694.
 - (2) *A.-G. v. Floyer* (1862), 9 H.L. Cas. 477; 21 Digest 86, 622.
 - (3) *A.-G. v. Smythe* (1862), 9 H.L. Cas. 497; 21 Digest 95, 697.
 - (4) *Floyer v. Bankes* (1863), 3 De G. J. & Sm. 306; 21 Digest 102, 754.
 - (5) *Lord Advocate v. Macalister*, [1924] A.C. 586; 21 Digest 107, 796.
 - (6) *Wolverton v. A.-G.*, [1898] A.C. 535; 21 Digest 90, 660.
 - (7) *Re Jenkinson* (1857), 24 Beav. 64; 21 Digest 88, 643.
 - (8) *A.-G. v. Baker* (1859), 4 H. & N. 19; 21 Digest 92, 678.
 - (9) *Re Ramsay's Settlement* (1861), 30 Beav. 75; 21 Digest 91, 670.
 - (10) *A.-G. v. Maule* (1886), 56 L.T. 611; 21 Digest 92, 675.
 - (11) *A.-G. for Ireland v. Rathdonnell* (1893), 32 L.R.Ir. 574; 21 Digest 91, 670*i*.
 - (12) *Finch v. Lane* (1870), L.R. 10 Eq. 501; 44 Digest 1051, 9037.
 - (13) *Re Heath, Public Trustee v. Heath*, [1936] Ch. 259; Digest Supp.
- G
- H

ADJOURNED SUMMONS to determine the rate of succession duty payable by beneficiaries entitled under a settlement dated Mar. 21, 1921, and made in pursuance of an agreement to settle dated Feb. 15, 1917. The agreement to settle was made between Edward Thomas Tyrwhitt Drake and his uncle, Guy Percival Tyrwhitt Drake, and certain other parties, and the settlement was made by the same two parties and other parties. In the events which happened, which, together with the relevant instruments relating to the settled property, are set out fully in the judgment herein, on the death of Edward Thomas Tyrwhitt Drake on Aug. 31, 1933, Thomas Tyrwhitt Drake, the eldest son of Guy Percival Tyrwhitt Drake, became entitled, as tenant in tail male, to the estates settled by the above-mentioned settlement, and he on Jan. 3, 1934, executed a disentailing deed, disentailing the said settled estates and capital moneys comprised in the above-mentioned settlement, whereby he became absolutely entitled thereto, subject only to the jointure payable to the widow of Edward Thomas Tyrwhitt Drake and to the portions charged on the settled estates in favour of the daughters of Edward Thomas Tyrwhitt Drake. In these circumstances, the question for determination was who, for the purposes of the assessment of the succession duty payable on the death of Edward Thomas Tyrwhitt Drake, was to be considered the predecessor within the meaning of the Succession Duty Act, 1853, s. 2, or whether, under sect. 13 of the same Act, Edward Thomas Tyrwhitt Drake and Guy Percival Tyrwhitt Drake were to be deemed joint predecessors. In the event of it being decided that Edward Thomas Tyrwhitt Drake was the sole predecessor, the duty payable by Thomas Tyrwhitt Drake, who was his cousin, would be 10 per cent., and that payable by his widow and children would be 1 per cent. In the event of it being decided that Edward Thomas Tyrwhitt Drake and Guy Percival Tyrwhitt Drake were joint predecessors, the duty payable by all the beneficiaries would be 1 per cent. on one half of their succession and 10 per cent. on the other half.

J. Bradley Dyne, for the plaintiffs, the present trustees of the settlement of Mar. 21, 1921, stated the facts.

A. M. Latter, K.C., and *T. K. Wigan* for the first defendant, Thomas Tyrwhitt Drake.

W. P. Spens, K.C., and *J. V. Nesbitt* for the second defendants, the widow and daughters of Edward Thomas Tyrwhitt Drake, interested as jointress and portionists.

J. H. Stamp for the Attorney-General.

Latter, K.C. : Succession is defined in the Succession Duty Act, 1853, s. 2, as any property to which a person becomes entitled on a death. If the settlement of 1921 merely carried out the agreement of 1917, it is clear on the face of that document that there are two settlors, Edward Thomas and Guy Percival, who agree to settle their separate interests.

If the matter had stopped there, this question could have been answered very shortly. But it is suggested that because the settlement was executed in 1921, and because at that date Edward Thomas had survived the dangers of the War, he is the sole person from whom the succession is derived, because Guy Percival, in the events which had happened, had no interest in the property. But the settlement of 1921 was simply a compliance with the provisions of the agreement of Feb. 16, 1917, and in 1917 it is clear that neither Edward Thomas nor Guy Percival alone could have made the settlement which it was agreed should be made. A

The second point which is relied upon by the widow and the portionists is that the effect of the provision, in the agreement and the settlement, that Guy Percival should be paid £10,000, was that Edward Thomas bought up the whole of Guy Percival's contingent interest in the property, which would have gone to him under the will of Herbert William if Edward Thomas had not survived the dangers of the War. It is said that when there are, as here, two settlors in form, but it can be shown that one has bought the other out, you must go to the substance of the matter and find out who really acquired the property in order to be in a position to make the settlement. But the probabilities are altogether against Guy Percival having given up the entirety of his contingent interest in return for £10,000, the gross value of the settled estates being about £257,000. Moreover, if Edward Thomas had bought Guy Percival out, one would have expected that he would have settled the property on his own daughters, rather than on Guy Percival's son. The correspondence which passed between the parties prior to the settlement of 1921 is also against the suggestion that Edward Thomas bought out Guy Percival. Guy Percival's main object was not to get money, but to keep the property settled in the male line. The £10,000 was received by him in return for his releasing his interest in the Cheshire property, and had nothing to do with the making of the settlement. Although either Edward Thomas or Guy Percival might have bought the other out, neither in fact did so, and the settlement was therefore made by them jointly. B C D E F

The third point which, as I understand it, I have to meet, is that, in 1933, when Edward Thomas died, as there was then no doubt that Edward Thomas had survived the dangers of the War, the interest of Thomas, on his becoming entitled in possession to the succession, was derived solely from what, as it has turned out, Edward Thomas had to dispose of in 1917. As to that, I say (i) that the disposition under which Thomas takes is not a disposition by Edward Thomas alone, because one has to look at the disposition which was actually made, which was the disposition made in 1917, and because the principle which is laid down in sect. 2 of the Act is that, once the succession has been determined, it is always a succession, and the liability to, and the rate of, duty is then fixed for all G H

time, irrespective of what may actually transpire. See the note to sect. 2 in HANSON ON DEATH DUTIES, 8th Edn., p. 440. Succession in sect. 1 is defined as denoting any property which is chargeable with duty under the Act. Under sect. 2, every disposition of property by reason whereof
 A any person becomes entitled to any property upon the death of any person shall be deemed to have conferred a succession. Therefore, on the making of a settlement *inter vivos*, the property charged with duty comes into being, the succession is then created, and the charge is then fixed. Sect. 10 deals with the rates of duty, which depend upon the relationship
 B of the successor to the predecessor in the disposition.

BENNETT, J. : If you can make good by authority the proposition stated in HANSON ON DEATH DUTIES, p. 440, it would seem that you must succeed.

Latter, K.C. : The first case I want to refer to is *Floyer v. Bankes* (4).

C It does not appear from the headnote of that case that this point was involved, but from the argument of the Solicitor-General and the cases cited it seems that it was raised and explained to LORD WESTBURY, L.C. : see p. 311, the second paragraph of his judgment. See also *Lord Advocate v. Macalister* (5), in which the words used by VISCOUNT CAVE about
 D “rate,” at p. 591, show that he based his decision upon the position that the rate of duty was fixed when the disposition took effect. *Wolverton v. Attorney-General* (6) supports the view that the succession, and therefore the rate of duty, is created once and for all. On the question of Edward buying out Guy Percival, all that the decision in
 E *Re Jenkinson* (7) comes to is stated in *Attorney-General v. Floyer* (2), i.e., that one of the parties to the settlement had become a creditor in the estate, and is summarised in HANSON ON DEATH DUTIES, p. 456. When, in *Attorney-General v. Baker* (8), POLLOCK, C.B., talks about doubts, he means only future doubts, as it was not known, at the time of the settle-
 F ment in that case, whether one of the parties thereto was legitimate and therefore that she had any title to a share in the property settled.

Spens, K.C. : In this case, the predecessor, and the only predecessor, was Edward, from which it follows that, as regards both the jointress and the portionists, the rate cannot exceed 1 per cent. Even if it were
 G a joint settlement, any interest which Guy Percival had was always subsequent and subject to Mrs. Venice Drake's charge of £1,200. All that the settlement did was to make her jointure, which had been con-
 H tingent on her husband surviving the War, a certainty. So anything she got out of the agreement or the settlement could only come out of her husband's estate, and in no case could the rate of interest as regards her interest exceed 1 per cent.

With regard to the portionists, I say that Edward Thomas is their predecessor also. There is no question but that, as the facts have turned out, it is from his interest alone that the portionists' successions are derived.

The fallacy in the argument that, the settlement having created the succession and fixed the rate once and for all, that rate must apply, whatever the subsequent events may be, is that there is no difficulty in the settlement producing alternative devolutions of the property. A settlor can provide that in certain contingencies the property shall go one way, and that in certain other contingencies it shall go another way: see *Re Ramsay's Settlement* (9). If, in these circumstances, the predecessor provided for by the first disposition is a near relative, the rate will be a low rate. But if the contingency happens so that the estate goes over to someone further away, the rate will be higher. Which will happen cannot be told at the date of the settlement, though it is quite true that the duty attaches at a certain rate if the property goes in one direction, and at a different rate if it goes in another direction. So HANSON ON DEATH DUTIES is not accurate in saying that the moment a disposition of property is made by a settlement *inter vivos* it must there and then be possible to say who is the predecessor and what is the rate of duty which is going to be payable on the succession falling into possession, although it is true that, when a settlement such as that in *Ramsay's* case (9) is created, it is possible to foretell to some extent what is going to happen.

BENNETT, J.: As soon as the settlement was executed your clients had property chargeable with duty under sect. 2. How many predecessors were there at that moment?

Spens, K.C.: There were two persons, one or other of whom might turn out to be the predecessor, so that it could not be said at that moment who was the predecessor. Sect. 13 of the Act makes it difficult to say that the rate must be ascertained at once. On the face of that section, it may be impossible to predicate, when the succession is created and the disposition is made, what the rate of duty will be. The whole thing may be left for agreement at the distant date when possession falls in. But that section applies only when it is impossible to say what the interest of the person joined in the settlement in fact is, i.e., where there is a dispute between the parties as to the ownership of property: see *Braybrooke (Lord) v. Attorney-General* (1). But such a case is quite different from the present one where we have one person only entitled upon the happening of a contingency.

You must look, not at the form of the document, but at the substance of the case: see *A.-G. v. Maule* (10), and the substance of this matter is as if the settlement had been made by two separate documents. Putting in Guy Percival as a joint settlor was a formality which cannot affect the result if you find in substance that he was not a settlor in the events which have happened. The decision in *Floyer's* case (2), as appears from LORD HERSCHELL'S judgment, had nothing to do with the point in this case. Nor had the similar point raised in *Lord Advocate v.*

Macalister (5). I agree that the duty is imposed and charged when the disposition is made, but not that the rate is then determined.

- Stamp* : In this case, there were two contingent successions, created from two contingent predecessors, but in each case there were the same successors in fact, though these successors might never have taken any interest in either succession. The disposition is not a joint disposition, because there was no joint interest in each of the settlors. The conveyancing device of putting two documents into one formula can make no difference to the result. A person cannot be made a predecessor by being put into a deed and being made to convey something which he has not got. Guy Percival had nothing, since the whole of the interest which he purported to dispose of in the settlement had wholly vanished when the War came to an end. What really happened in this case is that there were two contingent successions created, from two contingent predecessors. The successors were the same under both, though they might never have taken any interest in either succession. The possibility of successions being contingent because both could not materialise is what is contemplated by sect. 2 of the Act. These two contingencies cover the whole field, and together confer an absolute title, but it is only under one of them that Thomas can take. The only way by which Edward Thomas and Guy Percival could have been joint settlors would have been because, between the date of the agreement and the settlement, they had converted their separate interests into a joint interest. But a person cannot become a joint settlor merely by giving consideration : see *A.-G. for Ireland v. Rathdonnell* (11).

- I agree that you must look at the substance and not at the form of the matter. But *Floyer's* case (2) and *Lord Braybrooke's* case (1) were both cases where there had been a re-settlement by a tenant for life and remainderman, who joined in creating a joint power over the whole fee simple, and created an interest by the exercise of their joint power. But in each case the disposition was held to be that of the tenant in tail, because it was his interest in the property which was disposed of. Similarly, if you look at the substance of the document in this case, you will see that Guy Percival's purpose in joining in the making of it was to preserve the property in the male line of descent. It is necessary to look at the property concerned and see who disposed of it. The only interest which has contributed to the succession which has vested in Thomas is Edward's will, and it makes no difference that another interest was settled which may have been consideration for Edward settling his interest : see *Lord Braybrooke's* case (1). The principle to be applied is that laid down in *Lord Braybrooke's* case (1) and *Floyer's* case (2), and, in accordance with that principle, in this case Thomas derives nothing from Percival and everything from Edward.

BENNETT, J. : I do not think that that was the view taken in Feb.,

1917, if one pays no regard to the succession and looks only at the settlement. It would never have occurred to anyone in 1921 that the settlement contained two separate settlements. On the face of the document, there was a disposition of property by two persons.

Stamp : I agree that the document disposed of the whole property, A but, although these interests all come out of the same property, they do not come out of the same estate. The inquiry must be, not who are the parties who conveyed, but out of whose estate the interest is derived. It is clear that the estate of Thomas is derived exclusively out of the estate of Edward, because the estate of Guy Percival never came into B existence. After those cases, it is impossible to say that, where two persons concur in making a settlement of different properties, or different estates and interests in the same property, they should be treated as having become co-owners of the property and as making the settlement jointly : see *Finch v. Lane* (12), which supports my view of the effect of C Herbert William's will, i.e., that Edward took the fee simple subject to defeasance if he died during the War. The same principle was applied in *Re Heath, Public Trustee v. Heath* (13).

Latter, K.C., in reply : There is nothing in *Lord Braybrooke's* case (1) to suggest that the note in HANSON ON DEATH DUTIES, p. 440, is wrong. D Although it is true to say of that case that nothing in fact came out of the tenant for life, if you look at the date when the remainderman succeeded to the succession, the ground of the decision in all these cases is seen to be as stated by HANSON ON DEATH DUTIES in the note to sect. 2.

BENNETT, J. : There is no case which has decided that. E

Latter, K.C. : I suggest that that was the view of the Solicitor-General, who argued *Floyer's* case (2) and obtained a decision in the House of Lords, and who also argued the second *Floyer* case (4).

BENNETT, J. : The relevant facts, for the purpose of deciding the F question asked by the originating summons now before me, are as follows : On Apr. 28, 1910, certain hereditaments in the counties of Buckingham, Hertford, Lincoln, Chester, Oxford, Kent, London, and Somerset stood limited to uses under which William Wykeham Tyrwhitt Drake was tenant for life in possession, with remainder immediately expectant upon G the termination of his estate for life to his son Herbert William Tyrwhitt Drake as tenant in tail male with divers remainders over. By an indenture made Apr. 28, 1910, between the said Herbert William Tyrwhitt Drake of the first part, and the said William Wykeham Tyrwhitt Drake of the second part, and Garry Tyrwhitt Drake and Ellis Hicks Beach of the third part, the said Herbert William Tyrwhitt Drake barred his H estate in tail male or in tail, and conveyed the said hereditaments subject and without prejudice to certain charges and incumbrances, and the estates and charges prior to and to the powers overreaching his estate

in tail male or in tail, as to and concerning such of the said hereditaments as were situate in that part of the county of Kent, which was then in the administrative county of London, to the use of the said Garry Tyrwhitt Drake and Ellis Hicks Beach for a term of 1,000 years upon certain trusts, with and subject to certain powers and provisions thereafter declared and contained concerning the same, and as to all the other hereditaments, and also as to the said Deptford estates, from and after the termination of the said term of 1,000 years, and in the meantime subject thereto to the use of the said Herbert William Tyrwhitt Drake and his heirs for ever. The Deptford estates were limited to the said Garry Tyrwhitt Drake and Ellis Hicks Beach for the term of 1,000 years :

upon trust if there shall be any younger child or children of the said William Wykeham Tyrwhitt Drake, meaning thereby any of them, the said Edward Thomas Tyrwhitt Drake, Dorothy May Tyrwhitt Drake, and Heather Augusta Tyrwhitt Drake, who being male have attained or shall attain the age of 21 years, or being female have attained or shall attain that age or have married or shall marry, then the said Garry Tyrwhitt Drake and Ellis Hicks Beach or the survivor of them or other the trustees or trustee for the time being of these presents (hereinafter called the trustees or trustee) shall after the death of the said William Wykeham Tyrwhitt Drake raise by mortgage of the Deptford estates or any part thereof for all or any part of the said term or by and out of the rents and profits thereof or any part thereof or by the sale of timber or minerals or by all or any of the means aforesaid such sum of money (if any) for the portion of each of the younger children of the said William Wykeham Tyrwhitt Drake as the said William Wykeham Tyrwhitt Drake shall by any deed or deeds revocable or irrevocable or by will or codicil appoint but so that no sum in excess of £15,000 exclusive of interest shall be appointed to or raised for the portion of any one of such younger children.

By a deed poll of the same date, expressed to be supplemental to the last-mentioned indenture, the said William Wykeham Tyrwhitt Drake in exercise of the power in that behalf given to him by the last-mentioned indenture, appointed and directed :

First, that the trustees or trustee for the time being of the principal indenture shall after the death of him the said William Wykeham Tyrwhitt Drake raise out of the hereditaments comprised in the said term of 1,000 years by the ways and means mentioned in the principal indenture the sum of £15,000 for the portion of each of them the said Edward Thomas Tyrwhitt Drake, Dorothy May Tyrwhitt Drake, and Heather Augusta Tyrwhitt Drake who being male have attained or shall attain the age of 21 years, or being female have attained or shall attain that age or have married or shall marry, such sum of £15,000 to be an interest vested in the child for whom the same is directed to be raised at the age of 21 years in the case of a male and at the age of 21 years or day of marriage in the case of a female.

The said Herbert William Tyrwhitt Drake made his will on Mar. 11, 1915, in the following terms :

This is the last will and testament of me, Herbert William Tyrwhitt Drake, of Shardeloes Amersham in the county of Buckingham. I appoint my brother Edward Thomas Tyrwhitt Drake and Clement Macmichael Cheese of Amersham, solicitor (hereinafter called my trustees) to be the executors and trustees of this my will. I give devise and bequeath all the real and personal property of or to which I shall at my death be seised possessed of or entitled to (hereinafter called the trust property) except the legacies hereinafter mentioned unto my brother Edward absolutely should he survive the dangers of the present war in which he is engaged, and I declare that for the purposes of this trust the said war shall not be considered as being determined until the final terms of peace have been signed but if my said

brother shall not survive the said war but should die before the termination thereof as is hereinbefore defined, then the trust property shall from and after the decease of the survivor of myself and my said brother so dying as aforesaid be held for the purpose of raising and paying thereout an annuity or rentcharge of £1,200 to the widow of my said brother to whom I give and bequeath the same accordingly, such annuity or rentcharge to commence from the date of the death of her husband and subject thereto and charged therewith and to the legacies hereinbefore mentioned the ultimate residue of the trust property is to be held for my uncle Percy Tyrwhitt Drake absolutely.

Herbert William Tyrwhitt Drake died the same day, and his will was proved in the principal probate registry on Apr. 15, 1915, by the executors therein named. Under this will, Mr. Edward Thomas Tyrwhitt Drake became, in my judgment, entitled to the hereditaments comprised in and assured by the said indenture of Apr. 28, 1910, for a vested estate in fee simple in remainder immediately expectant upon the termination of the life interest of the said William Wykeham Tyrwhitt Drake therein, but such estate was liable to be divested in case Mr. Edward Thomas Tyrwhitt Drake should not survive the dangers of the then present War. The testator's uncle, Mr. Percy Tyrwhitt Drake, became contingently entitled to an estate in fee simple in remainder expectant upon the termination of the said life estate, the contingency being the failure of Mr. Edward Thomas Tyrwhitt Drake to survive the dangers of the then present war. At the time when Mr. Herbert William Tyrwhitt Drake died, Mr. Edward Thomas Tyrwhitt Drake held an officer's commission in the army. In such circumstances his expectation of life may not have been long. He was married, but at that date had no children. He appears to have been in some need of money. In 1916, negotiations were opened, between his legal advisers on the one side and the legal advisers of Mr. Percy Tyrwhitt Drake on the other, which ended in a written agreement of Feb. 15, 1917. The parties to the agreement were Mr. Edward Thomas Tyrwhitt Drake of the first part, Mr. Percy Tyrwhitt Drake (whose full christian names were Guy Percival) of the second part, Mrs. Venice Tyrwhitt Drake (the wife of Mr. Edward Thomas Tyrwhitt Drake) of the third part, and Charles James Phillips and Frederick Stanley Parker of the fourth part. The agreement recited the said disentailing assurance of Apr. 28, 1910, the will of Mr. Herbert William Tyrwhitt Drake, and that "after certain negotiations it has been agreed between the parties" that the hereditaments described in the schedule should be settled in the manner hereinafter set out. Cl. 1 is in these terms :

So soon as may be an indenture of settlement shall be entered into and executed whereby the hereditaments set out in the said schedule hereto shall be settled in the manner hereinafter described subject to the said life estate incumbrances powers and term of 1,000 years now subsisting so far as affecting the said hereditaments respectively.

2. The freehold hereditaments shall be settled to uses or upon trusts by way of strict settlement in the manner thereafter indicated (that is to say): (i) the first trustees of the settlement for the purposes of the Conveyancing Act, 1881, s. 42, and of the Settled Land Acts, 1882 to 1890, and for all other purposes shall be the

- trustees or if they or either of them fail to accept the office such other persons as the said Edward Thomas Tyrwhitt Drake or his legal personal representatives shall nominate for the purpose ; (ii) the said settlement shall contain a declaration binding the trustees or trustee for the time being of the said term of 1,000 years to hold the same upon trust by means of the powers vested in them to raise the sum of £10,000, part of a sum of £15,000, and the interest thereon appointed in favour of the said Edward Thomas Tyrwhitt Drake by a deed poll dated Apr. 29, 1910, under the hand and seal of the said William Wykeham Drake whether the said appointment shall have been revoked or not, and to pay the said sum of £10,000 and interest to the said Percy Tyrwhitt Drake at such times with such priority of charge and in such manner in all respects as if such appointment had been irrevocable and such sum of £10,000 and interest, part of the said larger sum of £15,000, had been assigned by the said Edward Thomas Tyrwhitt Drake to the said Percy Tyrwhitt Drake absolutely and free from incumbrances ; (iii) the said hereditaments shall be limited to the use of the trustees for a term of 1,000 years commencing from the death of the said William Wykeham Tyrwhitt Drake if the said Edward Thomas Tyrwhitt Drake shall so long live and subject as aforesaid to the use of the said Edward Thomas Tyrwhitt Drake for life without impeachment of waste ; (iv) if any wife of the said Edward Thomas Tyrwhitt Drake shall survive the said Edward Thomas Tyrwhitt Drake a yearly rentcharge of £1,200 as regards the said Venice Drake shall, and as regards any other wife, may be appointed to her by the said Edward Thomas Tyrwhitt Drake (will and shall be payable to her according) from the death of the said Edward Thomas Tyrwhitt Drake, and during the residue of her life for her jointure ; (v) subject thereto, the said hereditaments shall be charged with the payment of money for the portion or portions of a younger child or younger children of the said Edward Thomas Tyrwhitt Drake by the said Venice Drake, meaning thereby any child or children who being male shall attain the age of 21 years, or being female shall attain that age or marry other than any son or sons who before his or their respectively attaining the age of 21 years shall become entitled or any daughter or daughters who before her or their respectively attaining that age or marrying shall become indefeasibly entitled whether in possession or remainder to the said hereditaments for the first estate in tail male. If there shall be but one such younger child the portion shall be £10,000. If there shall be two such younger children and no more, the portions sum shall be £18,000. If there shall be more than two such children the portions sum shall not exceed £24,000. Maintenance money for the expectant portions after the death of the said Edward Thomas Tyrwhitt Drake shall also be charged on the said hereditaments not exceeding what the interest of the expectant portion or portions for the time being of any such child or children at the rate of 4 per cent. per annum would amount to . . . ; (vi) after the determination of the said life estate and subject to the said provisions for jointure portions and maintenance money, the said hereditaments shall be limited to the use of the first and other sons of the said Edward Thomas Tyrwhitt Drake successively according to seniority in tail male with remainder to the use of the said Percy Tyrwhitt Drake for life without impeachment of waste with remainder to the use of the first and other sons of the said Percy Tyrwhitt Drake successively according to seniority in tail male with remainder to the use of the first and other daughters of the said Edward Thomas Tyrwhitt Drake successively according to seniority in tail male with remainder to the first and other daughters of the said Percy Tyrwhitt Drake successively according to seniority in tail male with remainder to the use of the said Edward Thomas Tyrwhitt Drake his heirs and assigns for ever.
- The schedule to the said agreement describes the hereditaments to be settled in these terms :

The Tyrwhitt Drake family estate known as the Bucks estate ; the Tyrwhitt Drake family estate known as the Lincoln estate ; the Tyrwhitt Drake family estate known as the Deptford estate.

- Contemporaneously with the execution of that agreement, Mr. Percy Tyrwhitt Drake executed an undertaking in these terms :

In consideration of you this day completing the agreement for settlement with regard to the Tyrwhitt Drake estates made between Edward Thomas Tyrwhitt Drake of the first part Guy Percival Tyrwhitt Drake of the second part Venice

Tyrwhitt Drake of the third part and Charles James Phillips and Frederick Stanley Parker of the fourth part I hereby undertake and agree contemporaneously with the carrying into effect of such agreement to execute the deed of conveyance or release of my contingent interest in the Cheshire estates to Edward Thomas Tyrwhitt Drake from the charges created or to be created by virtue of the term of 1,000 years now subsisting therein in cl. 5 of the said agreement and then intended to have been executed at the same time as the agreement. Dated Feb. 15, 1917. A
G. P. T. Drake.

The undertaking is addressed to Edward Thomas Tyrwhitt Drake and Mrs. Venice Tyrwhitt Drake. Much delay occurred in executing a settlement in pursuance of the said agreement, and an action for specific performance was begun, but ultimately on Mar. 21, 1921, a settlement B was executed in fulfilment of this agreement. The operative clause is cl. 1; it was executed on Mar. 21, 1921:

In pursuance of the said agreement and in consideration of the premises the said Edward Thomas Tyrwhitt Drake and Percy Tyrwhitt Drake as settlors according to their respective interests in the premises do hereby grant unto the trustees and their heirs all and singular the freehold castles baronies manors or lordships advowsons rectories capital and other messuages cottages mills farms lands tenements fee farm rents tithes and other hereditaments situate or arising in the counties of Buckingham and Lincoln and in the parish of Deptford in the county of London more particularly described in the schedule hereto to hold the same unto the trustees and their heirs subject and without prejudice to the incumbrances and powers mentioned in and the said term of 1,000 years created by the said indenture of disentail to the uses following namely to the use of the trustees for a term of 100 years to commence from the death of the said William Wykeham Tyrwhitt Drake without impeachment of waste if the said Edward Thomas Tyrwhitt Drake shall so long live upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same and subject thereto. C D

2. To the use of the said Edward Thomas Tyrwhitt Drake and his assigns during his life without impeachment of waste and from and after his death to the use that if the said Venice Tyrwhitt Drake shall survive the said Edward Thomas Tyrwhitt Drake the said Venice Tyrwhitt Drake and her assigns shall thenceforth during her life receive the yearly rentcharge of £1,200 to be in substitution for the annuity given to her by the said will of the said Herbert William Tyrwhitt Drake and to be charged upon and issuing out of the said premises hereinbefore assured and to be considered as accruing from day to day but to be payable by equal quarterly payments without any deduction except duty the first of such payments to be made at the end of 3 calendar months after the death of the survivor of the said William Wykeham Tyrwhitt Drake and Edward Thomas Tyrwhitt Drake if the said Venice Tyrwhitt Drake shall be then living and subject and charged as aforesaid. E F

3. To the use of the first and every other son of the said Edward Thomas Tyrwhitt Drake successively in remainder one after the other according to seniority in tail male with remainder.

4. To the use of the said Percy Tyrwhitt Drake and his assigns during his life without impeachment of waste and from and after his death to the use of the first and every other son of the said Percy Tyrwhitt Drake successively in remainder one after the other according to seniority in tail male with remainder. G

On the same day, Mr. Guy Percival Tyrwhitt Drake and Mrs. Venice Tyrwhitt Drake executed a release of the contingent reversion in the Cheshire estates and of the annuity life charge of £1,200 per annum. H
Mr. Edward Thomas Tyrwhitt Drake, at the time of the execution of the last-mentioned settlement, was the father of four daughters by his wife, the defendant Venice, namely, the defendants Diana Evelyn, born on July 21, 1916, Joan Heather, born on Apr. 15, 1918, Delia Elizabeth,

born on Sept. 30, 1920, and Barbara, born on May 6, 1922. Mr. William Wykeham Tyrwhitt Drake died on July 29, 1929. Mr. Guy Percival Tyrwhitt Drake died on June 24, 1928. The defendant Thomas Tyrwhitt Drake is his eldest son. Mr. Edward Thomas Tyrwhitt Drake died on
A May 31, 1933. On his death, the defendant Thomas Tyrwhitt Drake, under and by virtue of the provisions contained in the said settlement of Mar. 21, 1921, became entitled in possession to the hereditaments thereby assured as tenant in tail male. By his will dated June 15, 1923, Mr. Edward Thomas Tyrwhitt Drake, in exercise of the powers in that behalf
B contained in the said settlement of Mar. 21, 1921, charged the hereditaments thereby assured as follows :

I hereby charge all the hereditaments which shall for the time being be comprised in and subject to the limitations of the settlement (but subject as therein mentioned) with the payment without any deduction except for succession duty of the several
C sums of money hereinafter mentioned in the different events hereinafter specified together with interest thereon at the rate of 4 per cent. per annum from the date of the same becoming payable as and for the portion or portions of my child or children who being male shall attain the age of 21 years or being female attain that age or marry (other than the first or only son or sons or daughter or daughters who before his her or their respectively attaining the age of 21 years or if female marrying under that age shall become entitled under or by virtue of the settlement to the said hereditaments for the first estate in tail male) that is to say : (a) if there shall
D be but one such younger child the sum of £10,000, (b) if there shall be but two such younger children the sum of £18,000, (c) if there shall be but three such younger children the sum of £24,000, (d) if there shall be four or more such younger children the sum of £30,000.

Those are the relevant facts, and upon them the question asked by the originating summons, to which the Attorney-General is a party, is
E as follows :

Whether Edward Thomas Tyrwhitt Drake is to be deemed to be the predecessor from whom the interests of the said defendants Thomas Tyrwhitt Drake, Venice Tyrwhitt Drake, and her four above-named infant children are derived within the meaning of the Succession Duty Act, 1853, s. 2, or whether the said Edward Thomas Tyrwhitt Drake and Guy Percival Tyrwhitt Drake or the said Edward Thomas Tyrwhitt Drake, Guy Percival Tyrwhitt Drake, and Venice Tyrwhitt Drake are to
F be deemed joint predecessors under the provisions of sect. 13 of the said Act from whom such interests are derived.

First of all, I will express my opinion upon an argument advanced by Mr. Spens on behalf of Mrs. Venice Tyrwhitt Drake and the infant defendants, to the effect that, although Mr. Edward Thomas Tyrwhitt
G Drake and Mr. Guy Percival Tyrwhitt Drake were both conveying parties in the settlement of Mar. 21, 1921, yet that instrument ought to be considered as the settlement of Mr. Edward Thomas Tyrwhitt Drake alone. This argument was based upon a contention of fact to the effect that the negotiations that ended in the agreement of Feb. 15, 1917,
H really ended in the purchase by Mr. Edward Thomas Tyrwhitt Drake of Mr. Guy Percival Tyrwhitt Drake's contingent interest under the will of his nephew Herbert for a sum of £10,000, and that the settlement was really Mr. Edward Thomas Tyrwhitt Drake's settlement. In my judgment, the facts do not point in that direction. First, it is inconceivable

to me that, if Mr. Edward Thomas Tyrwhitt Drake had really bought his uncle's contingent interest, and was himself making the settlement, he would have placed his uncle and his uncle's male issue in the succession to the family estates in front of his own family issue. He had one daughter born on Feb. 15, 1917. Secondly, if it had really been Mr. A Edward Thomas Tyrwhitt Drake's settlement, he would have nominated the trustees of it. He did not do so. The truth of the matter is, in my judgment, contained in Mr. Hunter's affidavit, and I accept his statement of the negotiations. Having disposed of that point, the answer to the question asked is, in my judgment, that the predecessor from whom the B interests of the defendants Thomas Tyrwhitt Drake, Venice Tyrwhitt Drake, and the infant defendants under the settlement of Mar. 21, 1921, are respectively derived, is to be deemed to be Edward Thomas Tyrwhitt Drake alone, and neither he and Guy Percival Tyrwhitt Drake jointly, nor they and Mrs. Venice Tyrwhitt Drake jointly, are to be deemed joint C predecessors under the provisions of the Succession Duty Act, 1853, s. 13. By sect. 1 of this Act, it is provided that the term "succession" shall denote any property subject to duty under the Act. Sect. 2 of the Act is as follows :

Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession"; and the term "successor" shall denote the person so entitled; E and the term "predecessor" shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

The terms of sect. 13 are these :

Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the commissioners to agree with the successor as to the duty payable; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly. F

The settlement of Mar. 21, 1921, was a disposition of property under G which Thomas Tyrwhitt Drake, Venice Tyrwhitt Drake, and the four infant defendants respectively have become beneficially entitled to property. They respectively are successors, and the statute says that the predecessor is the settlor from whom their respective interests are derived. In my judgment, the principle to be applied in determining H the person who is the predecessor referred to in the Succession Duty Act has been settled by three cases decided by the House of Lords : *Braybrooke (Lord) v. Attorney-General* (1), *Attorney-General v. Floyer* (2), and *Attorney-General v. Smythe* (3).

In *Attorney-General v. Floyer* (2), LORD CRANWORTH states the principles. On pp. 488 and 489, after he had stated the facts in *Lord Braybrooke's* case (1), LORD CRANWORTH is reported as saying as follows :

A The ground of the decision evidently was, that although the estate of the son arose under a joint appointment made by his father and himself, and although, therefore, the father was in a sense one of the settlors, yet he was not a settlor from whom the interest or any part of the interest of the son, in his character of successor, was derived. The interest of the son as successor was derived wholly out of his own prior estate tail, and in no respect from the estate of his father.

LORD CRANWORTH then proceeds to state the facts in *Floyer's* case (2),
B and to conclude upon them as follows :

Here Henry Bankes, and his eldest son William John, concurred in 1810 in suffering a recovery of certain settled estates, and in 1821, by virtue of a joint power of appointment, reserved to them by the deed creating the tenant to the præcipe, they resettled the estates to the use of Henry the father for life, with remainder to William John for his life, with remainder to his first and other sons in tail male, with remainder to George, second son of Henry, for his life, with remainder to his first and other sons in tail male, with remainders over. Henry the father died in 1834, and William John the son then succeeded to the estate, and he died without issue in 1855. As he succeeded to the estate before the passing of the Succession Duty Act, the precise question which was decided in *Lord Braybrooke's* case (1) never arose ; but if Henry the father had lived till 1854, instead of dying in 1834, it is certain on the authority of *Lord Braybrooke's* case (1) that William John, on succeeding in 1854, would have been held to be the sole settlor, for the
C purpose of ascertaining the succession duty payable by him. If he would have been the sole settlor for that purpose, I cannot understand on what principle it can be contended that the interests of those coming after him in the settlement were derived from any other source than that from which his own interest was derived. If he would have been held to be, within the meaning of the Act, the sole settlor from whom his own tenancy for life was derived, he was the sole settlor from whom the interests of his children, for life he had had any, and those coming after them in the settlement, were derived. Those interests all come out of the same estate as that
D out of which his own tenancy for life was derived. And the decision of this House shows that in order to ascertain who is the settlor, within the second section, i.e., the settlor "from whom the interest of the successor is derived," we must inquire, not who are the parties by whose conveyance the estate has been created, but who is the conveying party out of whose estate the interest in question has been derived ?
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Again, on p. 492, LORD CRANWORTH is reported as saying :
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As I have already explained, I think that the decision in the *Braybrooke* case (1) necessarily leads to the conclusion that the settlor, within the true meaning of sect. 2, must be a settlor out of whose estate the succession is derived, and so that though the act of the father in making the appointment was necessary to the creation of the portions, yet that, as they did not to any extent come out of his estate, he was not the settlor within the meaning of the statute.

Now, I doubt not that the uses to which the hereditaments assured by the settlement of Mar. 21, 1921, were limited would have been other than they were, if Mr. Percival Tyrwhitt Drake had not been able to impose his will upon his nephew. I doubt not that the limitations were the
H outcome of an agreement between Mr. Edward Thomas Tyrwhitt Drake and his nephew Mr. Percival Tyrwhitt Drake, and that, without agreement between the two, the uses to which the hereditaments assured by the settlement of Mar. 21, 1921, were limited would have been other than they were. But, as I understand LORD CRANWORTH'S speech, that is

not the question to be considered. The question is, out of whose estate were the respective interests of Mr. Thomas Tyrwhitt Drake, Mrs. Venice Tyrwhitt Drake, and the infant defendants derived? To this question, in my judgment, there can be but one answer. By the first clause of the settlement, Mr. Edward Thomas Tyrwhitt Drake and Mr. Percy Tyrwhitt Drake, according to their respective interests in the premises, did grant the hereditaments therein described to the uses therein declared. If Mr. Edward Thomas Drake had not been a party to the settlement, neither the defendants Thomas Tyrwhitt Drake, Mrs. Venice Tyrwhitt Drake, nor the infant defendants would, in the events which have happened, have taken any interest in the hereditaments thereby assured. If Mr. Percy Tyrwhitt Drake had not been a party to the settlement, and Mr. Edward Thomas Tyrwhitt Drake had been the only grantor, the interests of such defendants would have been the same as they now are. But before he died, the estate devised to Mr. Edward Thomas Tyrwhitt Drake by his brother's will became indefeasibly vested, and the contingent interest of Mr. Percy Tyrwhitt Drake had determined, because his nephew had survived the War.

For these reasons, I decide that the answer to the question asked by the originating summons is that Mr. Edward Thomas Tyrwhitt Drake was the predecessor from whom the interests of the defendant Thomas Tyrwhitt Drake, Venice Tyrwhitt Drake, and her four infant children are derived.

Solicitors : *Bircham & Co.* (for the plaintiffs and the second defendants) ; *Blyth, Dutton, Hartley & Blyth* (for the first defendant) ; *Solicitor of Inland Revenue* (for the Attorney-General).

[Reported by C. M. YOUNG, Barrister-at-Law.]

CULVER v. BEARD.

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J.), **January 11, 12, 1937.**]

- A** *Practice—Action for damages for negligence—Serious personal injuries alleged—Application to remit action to county court—County Courts Act, 1919 (c. 73), s. 2.*

The plaintiff in an action for damages for negligence was an infant and a poor person. The injuries alleged were of a serious character, and might result in permanent injury affecting her earning capacity. The defendants applied to have the action transferred to the county court. The judge who heard the application had before him the statement of claim and the defence; the plaintiff's counsel urged that the transfer should not be ordered on the ground that the injuries were serious. An order was made remitting the case to the county court. The plaintiff appealed:—

- B** **C** **HELD:** (i) there was a statutory discretion vested in the judge, and his exercise thereof ought not to be disturbed unless it could be clearly shown that he had acted upon a wrong principle.

(ii) an order under County Courts Act, 1919, s. 2, can be made in a poor persons case, since it does not order security for costs to be given, but merely orders remission to the county court if security is not given.

- D** **[EDITORIAL NOTE.** This case was considered under the provisions of the County Courts Act, 1919, s. 2, but as from Jan. 1, 1937, this section is replaced by the County Courts Act, 1934, s. 46. The later Act did not affect this case as the order appealed from was made on Oct. 20, 1936. The case considers the effect of *Stevens v. Walker* (1) and shows clearly that that case is no authority for saying that the Court of Appeal can override the exercise of his discretion by the judge making the order in such a case. If the judge, with all the material facts before him, exercises his discretion upon proper principles, the Court of Appeal is bound by his decision. The cases of *Farrer v. Lowe* (5) and *Owens v. Woosman*, *Owens v. Jones* (6) are considered and their effect carefully confined. If they conflict with the decision here, they must to that extent be considered as overruled.

- E** **F** **AS TO ACTION OF TORT REMITTED TO THE COUNTY COURT,** see HALSBURY, Hailsham Edn., Vol. 8, pp. 181, 182, paras. 284, 285; AND FOR CASES, see DIGEST, Vol. 13, pp. 484, 485, Nos. 340-352. See also NEW COUNTY COURT PRACTICE, 1937, pp. 45-47.]

Cases referred to :

- G** (1) *Campbell (Donald) & Co. v. Pollak*, [1927] A.C. 732; Digest, Practice, 855, 4004.
 (2) *Cook v. Imperial Tobacco Co.*, [1922] 2 K.B. 158; 13 Digest 485, 352.
 (3) *Bottomley v. Woolworth (F. W.) & Co., Ltd.* (1932), 48 T.L.R. 521; Digest Supp.
H (4) *Stevens v. Walker*, [1936] 2 K.B. 215; [1936] 1 All E.R. 892; Digest Supp.
 (5) *Farrer v. Lowe* (1889), 53 J. P. 183; 13 Digest 484, 343.
 (6) *Owens v. Woosman*, *Owens v. Jones* (1868), L.R. 3 Q.B. 469; 13 Digest 489, 394.
 (7) *Perry v. London General Omnibus Co.*, [1916] 2 K.B. 335; 13 Digest 485, 351.

APPEAL from an order of HORRIDGE, J., dated Oct. 20, 1936. The facts and arguments are fully set out in the judgments.

E. Howard for the appellant.

W. A. Fearnley-Whittingstall for the respondent.

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GREER, L.J. : This is an appeal from an order made by the learned judge in charge of the New Procedure List on a summons for directions under the powers which are granted to him by the County Courts Act, 1919, s. 2. The action was one which was brought for personal injuries occasioned by negligence for which the defendant was responsible. There was a statement of claim, and so far as the matter is before this court it is now supported by an affidavit showing that there were reasonable grounds for the allegation that the injuries would result in permanent injury to the plaintiff which might affect her earning capacity in the future. In those circumstances, the matter came before the learned judge, who had to exercise the powers which are given to him by the section to which I have referred, the County Courts Act, 1919, s. 2, which is in these terms :

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In any action founded on tort commenced in the High Court the defendant may, on an affidavit made by himself or by any person on his behalf showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the court or a judge for an order to transfer the action to a county court ; and thereupon the court or judge, unless the plaintiff satisfies the court or judge that he has such means, may, if the court or judge having regard to all the circumstances of the case thinks fit so to do, make an order that unless the plaintiff within a time to be limited in the order gives security for the defendant's costs to the satisfaction of the court or a judge the action shall be transferred to such county court to be named in the order as the court or judge may deem the most convenient to the parties.

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In my judgment, the words of that section make it perfectly clear that if the learned judge considers all the circumstances of the case it is left by statute to his discretion to say that the case is one which ought to be transferred to the county court. That being the position, I think it is clear now, whatever may have been the case at one time or another, that, having regard to the speeches of their Lordships in the case of *Campbell (Donald) & Co. v. Pollak* (1), the discretion is one to be exercised by the judge to whom it is given. "Court or judge" means the court or judge to whom the application is made, either the master or the judge on appeal from the master, and where the summons is taken in new procedure cases by the judge without first going before the master ; "court or judge" means the judge who hears the application, and does not mean the Court of Appeal. I am rather inclined to the view that, if this matter had come before me as the court or judge, I should have said : "The injuries are so serious in this case that, the tendency of county court judges being to deal day after day with matters of comparatively small monetary interest, it would be better to leave the case

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in the High Court and not to remit it to the county court." But that is not a matter, in my judgment, which this court is entitled to take into consideration for the purpose of overruling the discretion of the learned judge who took the other view, if he did take the other view.

- A What was before him? On the first occasion on which the summons came before him, his attention was called to the nature of the action, as shown by the statement of claim, in order that the learned judge might consider whether this was a case where there were very serious injuries alleged by the plaintiff, and also a defence which had been put
- B in either then or before the statement of claim. The learned judge had before him the claim that was made, and we have before us the claim that was made supported by affidavit. In those circumstances, I find it impossible at the present time to say that, because we differ from the view that the learned judge took, if we do so differ, we should therefore
- C allow the appeal and make an order, when the statute says that the power of making the order is a power which is vested in the judge, provided he considers all the circumstances of the case. Now, there have been decisions which are not irrelevant for us to consider. At first sight, until we read the exact words of the section, it looked as if there
- D was an alternative order, an order either for a remission to the county court, or for security for costs. But, when you read the words of the section, it quite clearly is not anything of the kind. It is an order for remission which can be avoided if the plaintiff gives security. It is not an order that he shall give security, but an order that if he does not do
- E so the case may be remitted to the county court. It would be impossible to say that the section means that you cannot make an order under the section except in cases in which you could make an order for security for costs, because the effect of that would be that in every poor persons case you could never make an order for remission at all, because it would
- F always be said, in all of those cases, "Inasmuch as you cannot make an order for security for costs, you cannot make an order to remit to the county court." That would leave the defendants at the absolute mercy of plaintiffs who were suing as poor persons. That cannot be the meaning of the section, and I think it is quite clear it is not the meaning of
- G the section. In addition to that, it has been decided by the Court of Appeal in the case of *Cook v. Imperial Tobacco Co.* (2) that an order may be made under this section for remission to the county court, and from the words of the section the order must be in the form provided by the section, namely, that if the plaintiff fails to give security then there
- H shall be an order remitting to the county court. I think that applies where the action is brought by a plaintiff who has got a certificate to sue as a poor person as well as in other cases, though at first sight I was rather inclined to take the other view. It is said that it was undoubtedly decided in the case of *Bottomley v. Woolworth (F. W.) & Co., Ltd.* (3),

that an order for security against a person suing as a poor person cannot be made, and, if made, it has no effect, and ought to be set aside. For the reasons I have given, that does not seem to have any bearing on the question we have to decide. Our attention was called to several cases in support of the appeal, one being the recent case of *Stevens v. Walker* (4). A I think if the judgments in that case are carefully examined it will be found that what the learned judges of the Court of Appeal were there deciding was whether they could reverse the order of the learned judge because he had not given any real consideration to the questions, one question being the seriousness of the claim which was being put forward B by the plaintiff, and the other being the question as to whether there was really any defence to the action at all. Those are circumstances which he was bound to consider, and, not having considered them, the learned judges of the Court of Appeal came to the conclusion that they were entitled to interfere with his order, because, by not considering C those questions, he had gone wrong in principle.

Now, it is extremely difficult, in cases with regard to what a judge does upon a summons, to ascertain what he really has considered. But we have this material in the present case, that when the summons first came on it was urged on the learned judge, by counsel who appeared for the D plaintiff, that he ought not to make this order because there was a very serious case alleged by the plaintiff, and presumably alleged with some chance of success, though the negligence on the part of the defendant was denied in the defence. How are we to say, sitting here, that the learned judge attached no weight to that argument, that he did not E consider it at all, and that we are therefore entitled to interfere with the exercise of his discretion by reason of the fact that he did not really consider the matter? I should not think it would be enough to upset the learned judge's decision merely to say that the matter was mentioned at some time or other, and that he said nothing about it. It must be F something like a real consideration of the questions which are the determining questions, and all the circumstances of the case. I find myself unable to say that the learned judge in the present case did not consider the circumstances which were urged before him as reasons why he should not remit this case to the county court. Therefore, I am G not satisfied by the argument which has been put forward that, in the present case, the learned judge exercised his discretion upon wrong principles.

Our attention has been called to two earlier cases, which, though not upon the construction of the same statute, are upon the statutory considerations which are *in pari materia* with the County Courts Act, 1919, H s. 2. The first case was the case of *Farrer v. Lowe* (5). That was a decision of the divisional court. Apparently it is reported only in the TIMES LAW REPORTS. It may mean that the learned judges in that

- case were not satisfied that the point as to the seriousness of the allegations made by the plaintiff had not been really considered by the learned judge; or, on the other hand, it may be, having regard to the way in which the question of discretion has been dealt with in recent years,
- A that the case is no longer binding upon this court. The same observations, I think, apply to the other case which was cited, *Owens v. Woosman* (6), with this addition, that, in that case; inasmuch as the court thought full consideration had been given to the matter, and did not set aside the order of the court below, the observations as to what
- B they would have done in other circumstances seem to me to be *obiter*, and not binding upon this court. In any event, the considerations which apply to the divisional court decision in *Farrer's* case (5) apply equally to the considerations of the reasons for the decision in the case of *Owens v. Woosman* (6).
- C Now, though I have said what I have to say, I do not wish for one moment to throw any doubt upon the proposition that great care ought to be exercised by a judge in chambers, or by a judge in charge of the New Procedure List, in exercising the jurisdiction which is conferred upon him by statute. It does not necessarily follow that, because the plaintiff
- D is a person without means, or insufficient means, of necessity there should be an order to remit the case to the county court. There are many cases where, notwithstanding the extra burden that is necessarily put upon the defendant in case he happens to be right in the litigation, it is right to say that the allegations are so serious, and the questions
- E involved are so full of difficulty, that the case is one which ought to remain in the High Court, notwithstanding the additional burden as to costs which it might put upon a defendant who *ex hypothesi* has some chance of succeeding in the action.

- For the reasons I have given, I have come to the conclusion that this
- F appeal should be dismissed, and dismissed with the usual consequences, which is that there will be such costs as a defendant is entitled to recover against a poor person, if that amount is anything at all.

- SLESSER, L.J.: In this action, founded upon tort, there is no
- G question but that the infant plaintiff, and the other plaintiff, are persons without visible means of paying the costs of the defendant, should a verdict not be found for the plaintiff. In those circumstances, by reason of the County Court Act, 1919, s. 2, the court or judge may, having regard to all the circumstances of the case, if they think fit so to do,
- H make an order, unless the plaintiff, within a time to be limited in the order, gives security for the defendant's costs to the satisfaction of the court or a judge, to transfer the action to the county court. That power, on the face of it, is a discretion vested in the judge before whom the matter is brought on an application for transfer, and I wish to

associate myself with the language of LORD WRIGHT, M.R., in the case of *Stevens v. Walker* (4), at p. 223, where he says :

I feel very strongly that the discretion in these very serious personal accident cases should be exercised with very great care—

a view which has been repeated by GREER, L.J., this morning. But A
because it is necessary that the discretion should be exercised with great
care, and because it should fully be recognised by judges exercising that
discretion that there are many cases where justice requires that the case
should remain in the High Court, nevertheless there remains by statute
a discretion in the judge, a discretion which can be disturbed in the B
higher court only on the recognised principles, and it has to be shown by
the appellant complaining of the exercise of this discretion that the
learned judge has done something which he ought not legally to do, so
that in effect he has not been exercising a judicial discretion at all.

Now, various grounds have been indicated in the case of *Stevens v. Walker* (4), and others may be found hereafter, which may support the C
view that there are matters, to which the learned judge should have
regard, which, in a particular case, he has failed to have regard to,
such, for example, as an action which is practically undefended—that
is a matter to which he has to have consideration—and such as the D
nature of the claim which, on the face of it, would be well above the
normal county court jurisdiction. A third one may be the difficult
legal problems involved in the case which make those problems appro-
priate to be considered in the High Court. There may be others. But
when we come to consider the present case, in my view, agreeing with E
my Lord, it is quite impossible to say that this learned judge has failed
to have regard to any matters which he ought to have had regard to,
or has taken into consideration matters which he ought not to have
taken into consideration.

What are the facts of this case ? The case comes before the learned F
judge on a summons in the New Procedure List for transfer to the county
court. There is placed before him a statement of claim containing the
allegations of the negligence, and of the injuries, which are stated
certainly in such a form—and I am far from expressing any opinion as
to whether they are correct or not ; that will have to be determined at G
the trial—as to indicate that they are very serious injuries. He had
also before him a defence which not only asserts that the collision was
caused by the negligence of the infant plaintiff, but in terms denies
that the plaintiffs, or either of them, have suffered the alleged
injury, loss, or damage. So, on the face of it, this is clearly a case which H
is fully defended.

Next, counsel for the plaintiff takes this point against the transference,
not that his client has no visible means of paying the costs which it
would be impossible for him to do owing to the fact that his own client

appears in the guise of a poor person, but, beyond merely asking formally that there shall be an affidavit to corroborate that assertion that the plaintiff cannot pay the costs—a point taken by him—he objects to the learned judge that there should not be a transfer because the injuries
A were serious. Therefore, the learned judge had before him the pleadings and the objection that this was not a proper case for transfer because of the seriousness of the injuries. I do not know what other matters might have been urged before the learned judge. If there were any, Mr. Howard in his discretion did not mention them. Having regard to
B that fact, the learned judge on the second hearing makes up his mind that he will order the transfer. How can we, sitting here, say that he has failed to have regard to the matters Mr. Howard urged before him? It would be a poor compliment to Mr. Howard that the learned judge did not give to his no doubt very persuasive arguments all the weight
C they deserved. We have heard him with very great interest, and, if I may say so, he appears to be a counsel who is fully competent to express his opinion on any point, be it a good one or a bad one, and I have no reason to assume that the learned judge had not before him the facts in the pleadings and the fact that Mr. Howard urged that these
D injuries were serious. Nevertheless, he makes this order for transfer. In my view, it is not possible to say that any of the grounds which existed in the case of *Stevens v. Walker* (4), or, indeed, any other grounds, have impinged his discretion.

The only other matter which remained, and which Mr. Howard was
E reluctant to take before this court (and I think now we have examined the matter we know why he was so reluctant), is the fact that, owing to the difficulty of the decision in the case of *Bottomley v. Woolworth (F. W.) & Co., Ltd.* (3), an order for security for costs cannot be made in the High Court in respect of a poor person. But, as my Lord has
F pointed out, this section does not require the court to order security for costs, or give it power so to do; it merely gives the court power to order that a case may be remitted to the county court, unless the plaintiff, within a time limited in the order, gives security. However that matter may be, so far as I understand the authorities, the question is put at
G rest by the decision of this court in the case of *Cook v. Imperial Tobacco Co.* (2), where BANKES, L.J., uses the following language. He says, speaking of *Perry v. London General Omnibus Co.* (7):

The case, however, stands as a clear authority, and binding upon this court, that a master or a judge when dealing with an application to transfer an action to the county court has a full discretion to make the order for transfer, even though
H the applicant may already have obtained an order entitling him to sue *in forma pauperis* in the High Court.

That view is accepted by the rest of this court in the case of *Cook v. Imperial Tobacco Co.* (2), and is binding upon us. It follows that, by the absence of any reason to show that the learned judge has not properly

exercised his discretion, and the failure to show that there is any impropriety in making an order in the case of a poor person, this appeal must fail, with the consequences stated by my Lord.

SCOTT, L.J. : I agree, and only add two observations. The first is, that it is an assumption of sect. 2 of the Act of 1919 that, in the county court, when a case is remitted, the county court judge will give the same effective justice as would have been given in the High Court, and, particularly, that there is no reason why he should give less damages to a successful plaintiff than would have been given in the High Court. A

The other observation is that, in these accident cases, the two matters upon which the discretion of the learned judge should be based are the two referred to in the recent case of *Stevens v. Walker* (4), in the judgment of LORD WRIGHT, M.R., namely, the gravity of the claim and the strength of the defence. *Prima facie*, where it is a case of personal injuries, and the injuries are such as in all probability to cause permanent earning incapacity in greater or lesser degree throughout life, that case ought normally to remain in the High Court. The Poor Persons Rules, in a case of that kind, make it very much less important to consider whether security should be given or not than was the case in the old days before the Poor Persons Rules. Therefore, the earlier cases dealing with security do not throw very much light on the present position. Beyond that, I have nothing to add to the judgments which have been delivered, and with which I agree. B C D

Solicitors : *Edgar H. Hiscocks* (for the appellant) ; *William Easton & Sons* (for the respondent). E

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

JOEL v. BARCLAY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, J.J.),
January 15, 1937.]

A *Gaming and Wagering—Betting house—Receiving money on deposit—Information giving three dates—Duplicity—"Deposit"—Summary Jurisdiction Act, 1848 (c. 43), s. 10—Betting Act, 1853 (c. 119), s. 4.*

B The charge against the appellant was that being the occupier of a place used for a betting game he unlawfully did receive money as a deposit on certain bets, contrary to the Betting Act, 1853, s. 4. The date in the information was "between May 30, 1936, and June 1, 1936." Persons taking part in the game paid 1d. It was found as a fact that on May 30, 1936, pennies were laid on the table by the players and taken by the appellant or his assistants before the game was decided. On May 31 and June 1, 1936, the pennies paid by the players were paid after the game was decided. The appellant contended (i) that the information was bad for duplicity and (ii) that what was paid by the players could not properly be called a deposit on any bet:—

C HELD: (i) the information charged only one offence, and the fact that three days were comprised in the period named in the information did not make it bad.

(ii) although the players paid the whole stake payable in respect of the game this was none the less a "deposit" within the Betting Act, 1853, s. 4.

D [EDITORIAL NOTE. Of the two objections raised to the conviction here that of duplicity in the information is probably the more serious; but since the decision in *Onley v. Gee* (1), it has been taken as well established that a charge of committing the same offence on a series of occasions is not defective. However, while not actually dissenting on this point, GODDARD, J., states that he had found it a question of much difficulty. The determination of the meaning of "deposit" in the Betting Act, 1853, s. 4, follows the decision in *Boulton v. Hunt* (2).

E AS TO DUPLICITY IN INFORMATIONS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 599, 600, para. 1044; and FOR CASES, see DIGEST, Vol. 33, pp. 322, 323, Nos. 372-381.

F AS TO DEPOSIT ON BET, see HALSBURY, Hailsham Edn., Vol. 15, p. 512, para. 918; and FOR CASES, see DIGEST, Vol. 25, pp. 447, 448, Nos. 400-408.]

Cases referred to:

(1) *Onley v. Gee* (1861), 25 J.P. 342; 25 Digest 450, 416.

(2) *Boulton v. Hunt* (1913), 77 J.P. 337; 25 Digest 447, 406.

(3) *Welton v. Ruffles*, [1920] 1 K.B. 226; 25 Digest 422, 253.

G APPEAL by way of case stated from a decision of the justices for the county of Northumberland, sitting at Whitley Bay.

The facts found by the case stated were as follow:

H The appellant Joel was the tenant and occupier of a piece of ground on which he owns a circular wooden stall in which he had therein a number of tables or boards. Each of these tables have thirty holes which are numbered—the highest number being 10. In the centre of the stall are displayed a number of articles such as chocolates, cigarettes, clocks, etc., substantially exceeding the sum of one penny in value. The public stand outside the stall. The appellants Locke, Gillespie, Livingstone and Jobling, were employees of the appellant Joel. Persons taking part in the game paid one penny and were given three balls. When all the tables were taken, a signal was given for the players to roll the balls up the tables into

the holes. The player securing the highest score was declared the winner and received a prize, which was either chocolate or cigarettes. This prize was valued at about 6d. In the centre of the stall were the appellants Lock, Gillespie, Livingstone and Jobling—three were engaged in picking up the pennies laid on the tables by the players and one receiving the money collected and checking prizes which were won. On the dates in question numbers of people—men, women and children—took part in the game.

On May 30, 1936, pennies were laid on the tables by the players and taken by the appellants before the balls were given to the players. On May 31, 1936, and June 1, 1936, the pennies paid by the players were paid after the game was decided. On these dates there was a blackboard at the back of the stall on which was chalked "The New Tote Game. All patrons play on the Pool Tote System. Prizes awarded to the highest score. You pay after the result. We work on a percentage system only."

H. I. P. Hallett, K.C., and *R. E. K. Thesiger* for the appellants.

Hon. Quintin M. Hogg for the respondent.

LORD HEWART, L.C.J. : This is a case stated by the justices for the county of Northumberland, sitting at Whitley Bay. The case shows that certain informations dated June 4, 1936, were preferred by the present respondent, an inspector of police, under the Betting Act, 1853, s. 4, against the appellants. There is a distinction between the appellants. The appellant Joel was charged :

for that he between May 30, 1936, and June 1, 1936, being the occupier of a certain stall used for the purpose of certain money being received as and for the consideration of a certain assurance undertaking to give thereafter a certain valuable thing on the happening of a certain event or contingency of or relating to a game, unlawfully did receive money as a deposit on certain bets on condition of giving valuable things on the happening of a certain event or contingency of or relating to a game called "Roll Up," contrary to the Betting Act, 1853, s. 4.

The other appellants were charged on information with being persons "assisting in conducting the business" of that stall. The justices, having heard the evidence, convicted, and imposed a fine of £5 5s. upon the appellant Joel, and £1 each upon his assistants. The question raised on this case is whether, in so determining, the justices came to a correct decision in point of law.

It is not necessary to repeat in full the facts of the case, but when the game was played, persons taking part in the game paid one penny and were given three balls. When all the tables were taken, a signal was given for the players to roll the balls up the tables into certain holes. The holes were thirty in number, and each ball could reach the highest number of 10. The player securing the highest score was declared the winner, and received a prize which was either chocolate or cigarettes. The prize was valued at about 6d. The case further finds :

On May 30, 1936, pennies were laid on the tables by the players, and taken by the appellants before the balls were given to the players. On May 31, 1936, and June 1, 1936, the pennies paid by the players were paid after the game was decided.

The date in the information was "between May 30, 1936, and June 1, 1936". No evidence was called by the appellants, but it was

contended in law that the summonses were bad for duplicity in alleging the offence between the dates mentioned. That is the first of the points argued before us to-day. It has also been argued—that is contention 8 of the appellants, as set out in the case—

A That it was not proved that any of the appellants had received money as deposits on bets on any of the occasions referred to [in the informations].

The first question of substance raised on behalf of the appellants is that the informations and the summonses were bad for duplicity, and attention was directed to the Summary Jurisdiction Act, 1848, s. 10. Undoubtedly that Act provides that every complaint upon which a justice is authorised by law to make an order, and every information for an offence punishable upon summary conviction, subject to certain exceptions, may be made in a certain way; and every such complaint and every such information shall be but for one offence only and not for two or more offences. The question is: Did these informations allege more than one offence? In my opinion, they did not; nor could there have been upon them more than one conviction, or more than one penalty, in the case of each of the defendants. What is the offence which is alleged? It is the offence set out in sect. 4 of the Act of 1853, and it is manifestly of a composite nature. That section provides:

E Any person, being the owner or occupier of any house, office, room, or place [this was a place] opened, kept, or used for the purposes aforesaid [that is, for the purposes of betting, which was prohibited in the earlier part of the Act] or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to—

among other things, any game. Stopping there, it is plain that, in order to convict, the prosecution must show two ingredients. One is that the defendant is a person who fulfils certain conditions: he is the owner or occupier of a place opened, kept, or used for certain purposes, or is some person acting on his behalf. The first thing is to show that that condition was fulfilled. Incidentally, that involves showing that there was indeed a place opened, kept, or used for the prohibited purpose by the owner or occupier. But that is not the whole of the matter. The complaint must go further, and show that that person, being what he was, received “directly or indirectly, any money or valuable thing as a deposit on any bet, on condition of paying any sum of money,” etc. The allegation here is that this defendant Joel, the present appellant, between May 30, 1936, and June 1, 1936, offended against that section. It is to be observed that three days are comprised in the period named in the information: May 30, May 31, and June 1. But the offence which was charged was one offence. It was that, within the period so named,

he offended in both respects : namely, that he was the occupier of this place, and, being such occupier, he did receive money or a valuable thing as a deposit on a bet. The information on the face of it is an information which charges one offence. It matters not, in my opinion, that the days are not one day, but three days.

Reference has been made to the case of *Onley v. Gee* (1), with reference not quite to the same subject matter, but a case which I think makes the point clear, where WIGHTMAN, J., dealing with that information, which spoke of Oct. 5 in a certain year, "and divers other days and times between Oct. 5 and the laying of the information," said at p. 343 :

It certainly seems to me that the information would have been perfectly good if one day only, Nov. 8, had been laid as the time when the offence was committed ; and I think that though the information says the offence was not on that day, but on Oct. 5 and on divers other days and times, it is well laid, and is perfectly good.

The criticism which is offered on behalf of the appellant is that, although the offence which was charged was one, and although the information could mature only in one conviction and in one penalty, nevertheless the appellants were prejudiced, because the evidence which was offered went to show that money was received on three separate days and in two separate ways : namely, on May 30, and May 31, and on June 1. It is said that the prosecution, if not before the information was laid, at any rate before the case was opened, should have decided, with reference to these days, upon which day it was alleged that the offence charged was committed. No doubt it was open to the prosecution to take that course ; but in my opinion it is not necessary that the prosecution should. The offence charged is that the defendant, being the occupier of a certain place, used in a certain way, received money between certain dates. The evidence may well have been thought relevant for the purpose of showing the user of the place. It certainly could not have been used for the purpose of inviting the justices to make more than one conviction. In fact, the justices, having heard the evidence, came to the conclusion, upon two of the days with reference to which evidence had been offered, that the offence had not been committed, but that it was committed upon one of the three days. They accordingly convicted. It seems to me that the fact that evidence was offered with regard to those two other days, evidence which failed to show that the offence was committed on either of those two days, does not in the least vitiate the conviction which was made. Nor do I think that there was any hardship upon the appellants in the fact that the net was sought to be drawn as widely as the period of three days, when one remembers the nature of the offence which is alleged, consisting of the two parts : keeping a place for a certain purpose, and then, in that place, receiving money of a certain kind.

The second point which was raised was that, upon the true construction

of this section, what was paid here could not properly be called a deposit on any bet. Reliance was placed for the purpose of that argument on a decision in the case of *Boulton v. Hunt* (2). With regard to that case,

- A an offence under the Betting Act, 1853, s. 4, it was not necessary that the persons making the bets with the occupier or with his assistants should physically resort to the premises. That is the decision in that case. The justices had imperfectly made their findings of fact, and no doubt, in the course of the judgment, the nature of the deposit was considered.
- B It was argued, apparently, in that case, that, in order to be a deposit upon a bet, the amount which the party to the bet paid must be somewhat less than the total amount of the stake for which he was, or was intending to be, liable. Mr. Marshall Hall, K.C., in the argument contended, as appears at p. 338, that :

- C There was no "deposit" in this case, for the persons making the bets handed in the full amount of their stakes.

It is with reference to that argument, I think, that the observations by the learned judges in that case about the deposit are to be read. What PHILLIMORE, J., said was this :

- D With regard to the word "deposit" in sect. 4 of the Act, it has been contended for the respondent that that means part payment only of the sum which the person making the bet means to stake. In my opinion that is not the right view. If a person proposes to bet with a bookmaker at 3 to 1 in sovereigns, and gives a sovereign to the bookmaker, he deposits it. The word "deposit" is not confined to a case in which he only hands to the bookmaker a sum smaller than the stake.
- E A smaller sum would be a deposit, but a deposit may be of the full amount which the person stakes, for it is paid to the bookmaker to be held by him on trust to repay it or its equivalent, along with the additional amount which the bookmaker has agreed to pay in case he [the bookmaker] loses.

AVORY, J., expressed himself somewhat differently ; but not, I think, by way of subtracting from the force of the proposition that a deposit

- F is not confined to the case in which a part only of the stake is handed to the bookmaker. Here what happened was that every person who was taking his chance in this building, not, indeed, for a money prize, but for money's worth, began by paying a stake. He paid a penny. At no moment was he to be called upon to pay more. In other words,
- G he paid the whole of his stake. That seems to me to be clearly payment of a deposit of the whole of his stake, so far as his side of the bet was concerned. In point of substance, the case seems to me to resemble closely the facts discussed in *Welton v. Ruffles* (3), where the money which was paid was called an entrance fee, in order that the person
- H paying might take his part in the game, for which the prize was to be a kettle. It is to be observed about this section that, when the expression "money" is used, the section goes on to say "or other valuable thing." I think, therefore, there is really no substance in the contention, which has been pressed upon us, that the payment of the whole stake

here was not the payment of a deposit, within the meaning of this section. Therefore I think the justices made no error in law upon the materials which were before them ; and I think this appeal ought to be dismissed.

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SWIFT, J. : For the reasons which my Lord has given, I agree with him on both points, and I do not wish to add anything.

GODDARD, J. : On the point as to whether or not this money was properly described as a deposit, I agree with LORD HEWART, L.C.J., and SWIFT, J. I had some doubt at one time with regard to the effect of the decision in *Boulton v. Hunt* (2), but, except for that decision, I should not have felt any difficulty about it.

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It is the other part of the case which has given me, and which I confess still gives me, considerable trouble—namely, whether it is right, and whether it is in accordance with the Summary Jurisdiction Act, 1848, s. 10, to prefer a charge of this sort in this form : that is, to charge a man with doing these acts or this act between certain dates. The difficulty I feel about the matter is this. Under the Betting Act, 1853, s. 4, it is, no doubt, necessary to prove, as the foundation of your case, that the man is keeping a betting-house. It may, therefore, well be necessary to give evidence of certain bets being received, either on one day or on more than one day. But that is not the offence with which he is charged. Having proved that he is the keeper of a betting-house, you then have to prove that he has received a deposit on a bet. Each time he receives a deposit on a bet, it seems to me, under the statute, that he commits an offence. I cannot help feeling in this case that if the defence had said : “ On what day do you allege that I received a bet ? ” the answer would have been : “ We are going to prove, if we can, that you received a bet on every day between those dates, that is to say, on the three days.” As the matter turned out, evidence was led to that effect, and the justices found in the one case there was an offence, but on the other two days there was no offence. I think if the defence had asked, at any rate, that the prosecution should be made to elect upon which date they were going to proceed, it would have been only right, considering that they could charge only one offence ; and if they had elected to take the date of June 1, although the offence had been established that the defendant was keeping a betting-house, the charge would have failed, because the justices found that he did not receive a deposit on a bet on that day. I think, however, that, technically, the information can be upheld on the ground that the information charges the man with unlawfully receiving money as a deposit on certain bets, on the condition of giving things in a certain event. That does seem to me to charge one offence only. But, speaking entirely for myself, I cannot help thinking

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that it would be better, and indeed fairer to the defendant in these cases, if it is meant to give evidence that the man is receiving bets on three days or on four days, that he should be charged in respect of each day on a separate information. Then, if one information succeeds and
 A the other fails, he is entitled to have those other informations dismissed. I cannot help feeling that there is a temptation, a natural temptation, in a case such as this, if the magistrates find, as I am assuming that they found in this case, that an offence was committed, not only on May 30, but also on May 31, and June 1, perhaps to put on a penalty of £15
 B instead of a penalty of £5, and there would be a tendency in those circumstances to forget that they cannot convict him of more than one offence. I do not think enough attention was paid in this case, at the hearing before the magistrates, to making it clear that each bet was a separate offence; but, as I say, especially as my Lord feels so clear
 C about it, I do not dissent on that point, because I think technically it is just possible to uphold this information, though I do not pretend that I have not felt considerable doubt about it.

Appeal dismissed with costs.

Solicitors: *King, Wigg & Brightman*, agents for *Frank J. Lambert*,
 D Gateshead (for the appellants); *Milner & Bickford*, agents for *Thomas D. Shaw*, Morpeth (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

E WILSON v. MURPHY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 13, 1937.]

Gaming and Wagering—Football pool on credit basis—Breach of instructions by collector.

F The respondent employed about 10,000 collectors in different parts of the United Kingdom for the purpose of conducting and carrying on football pool betting businesses. He issued printed instructions to every collector not to accept or collect money invested by clients until after the matches had been played, as it was illegal to accept it at the time the investment was made. One collector sometimes accepted
 G money at the time of investment without the respondent's knowledge, but did not send the money to the respondent until after the results of the matches were known. The words "credit only" were printed on every coupon in bold type. In consequence of the said collector's conduct, the respondent was charged with publishing coupons of two ready money football betting businesses, contrary to the Ready Money Football Betting Act, 1920, s. 1:—

H **HELD:** as the respondent published coupons of a credit business and gave most careful instructions to his collectors not to take money at the time of investment, he was innocent of the offences with which he was charged.

[**EDITORIAL NOTE.** The general rule is that a master is not liable criminally for the acts of his servant unless he can be said to have authorised them or shut his

eyes to the commission of such acts. There are certain well known cases where it has been held that the master is liable for the acts of his servant, although he is quite unaware of them and has given express orders forbidding them. In such cases there has been said to be an absolute prohibition of the acts in question. The case of ready money football betting is not one of the latter cases, where the master has taken every proper precaution to prevent such acts and has left the servant with no discretion as to what he may or may not do. A

AS TO CRIMINAL RESPONSIBILITY OF MASTER FOR ACTS OF SERVANTS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 12, 13, para. 4; and FOR CASES, see DIGEST, Vol. 14, pp. 38-47, Nos. 83-153.

AS TO FOOTBALL BETTING, see HALSBURY, Hailsham Edn., Vol. 15, pp. 509, 510, para. 916; and FOR CASES, see DIGEST, Vol. 25, p. 449, No. 415.] B

Case referred to:

(1) *Allen v. Whitehead*, [1930] 1 K.B. 211; Digest Supp.

APPEALS by way of case stated from a decision of the recorder of Liverpool allowing an appeal by the respondent against a conviction by C the stipendiary magistrate sitting at Liverpool.

Two informations were preferred by the appellant, the chief constable of Liverpool, against the respondent charging him with having on various dates at Liverpool published (a) coupons of a ready money football betting business called the "Staunch Totalisator Football Pools," and (b) coupons of a ready money football betting business called the "Everyman's Penny Pool," contrary to the Ready Money Football Betting Act, 1920, s. 1. The stipendiary magistrate convicted the respondent of both offences and fined him £50 and £3 12s. costs in respect of each offence. The respondent appealed to quarter sessions E and the recorder allowed the appeals and quashed the convictions. Thereupon a case was stated by the recorder at the request of the appellant. At all material times the respondent, who was a commission agent, carried on the said football pools on a credit basis only from his address in Edinburgh, for which purpose he employed about 10,000 F collectors in various parts of the United Kingdom. One of the collectors was a Mr. Hughes, a confectioner and tobacconist in Liverpool. The respondent had not met Mr. Hughes, who had been a collector since Jan., 1935, until the date of the hearing before the stipendiary. The respondent issued printed instructions to Mr. Hughes, by which Mr. G Hughes had agreed to be bound. The first instruction was in the following terms:

The money invested by clients must not be accepted or collected until after the matches have been played. It is illegal to accept money at the time the investment is made.

No discretion was transferred to Mr. Hughes by the respondent as to the manner in which Mr. Hughes was to act. During the football season the respondent sent to Mr. Hughes coupons with return forms, payment forms and envelopes appropriate only, as between the respondent and H

Mr. Hughes, to a credit business. The words "credit only" in large type were printed on the coupons and forms, copies of which were attached to the case. Although not obliged to do so, Mr. Hughes published a number of the coupons by placing them on the counter of
A his shop for the convenience of his customers, who filled in the coupons and returned them to Mr. Hughes, who in certain cases accepted payment of the sums at the same time, instead of waiting until after the matches had been played. Mr. Hughes accepted those sums for the convenience of himself and his customers, and not for the convenience
B of the respondent or his business. Mr. Hughes forwarded the coupons collected by him each week to the respondent, and all coupons taken from the shop had to be returned through Mr. Hughes. No money was sent by Mr. Hughes to the respondent with the coupons, but the amount due was forwarded by him after the results of the matches had
C been made known. The respondent had no reason to suspect that Mr. Hughes was accepting money with the coupons and did not intend the coupons to be so used. The words "credit only" upon the coupons constituted a genuine condition of entry. It was the practice of the respondent to dismiss any collector in the event of any report showing that
D a collector had departed from the instructions, but no such report was received by the respondent with regard to Mr. Hughes.

The appellant, while not disputing the facts, contended that the Ready Money Football Betting Act, 1920, s. 1, was an absolute prohibition, that the infringement thereof by the respondent or his agent
E was the responsibility of the respondent, and that the Act would be rendered nugatory unless such vicarious responsibility was imposed on the respondent.

The respondent contended that his business was a credit business only, that the fact that Mr. Hughes without authority had accepted sums of
F money did not alter the nature of respondent's business, and that the respondent was not in law responsible for the acts of Mr. Hughes in accepting cash with the coupons.

The recorder allowed the respondent's appeals, whereupon these appeals were brought.

G *F. E. Pritchard* for the appellant.

Sir William Jowitt, K.C., and *Hartley Shawcross* for the respondent.

LORD HEWART, L.C.J. : This is a case stated by the learned recorder of Liverpool. It arises out of an appeal heard by him against convictions
H of the present respondent for publishing certain coupons of a ready money football betting business. The respondent had been convicted by the learned stipendiary magistrate of Liverpool, and had been ordered to pay certain substantial fines and costs. From those convictions he appealed, and the learned recorder, subject to this case stated, allowed

the appeal. The only question is whether in so doing the learned recorder came to a correct conclusion in point of law. Now his conclusion was that so far as the respondent was concerned no offence had been committed ; and it seems quite obvious, when one looks at the whole of this case (in which, as Mr. Pritchard has said, all the facts are found in favour A of the respondent) that the conclusion of the learned recorder was right, and was right for the reasons which he gives.

To put the matter quite simply and shortly, the charge was that this respondent had published the coupons of a ready-money football betting business. The evidence conclusively established that what he had B published was a collection of coupons of a credit football betting business, that he had given the most careful directions to his collector, that the documents were labelled "Credit" all over them, and that, without any knowledge on the part of the respondent, the particular collector in C Liverpool had chosen, contrary to his instructions, which he had undertaken to obey, to employ the documents supplied to him for the purpose of a credit business as documents useful for the purposes of ready-money betting. In our opinion, the learned recorder came to a correct conclusion, and has given correct reasons for it, and I think no useful attempt can be made to draw an analogy between this case and such a case as D *Allen v. Whitehead* (1), where this court held that a licensee was liable, where prostitutes had been harboured on licensed premises and the harbouring had been permitted by a manager put in by him, and contravening his instructions in the matter. There, obviously, the licensee had put into a position of responsibility a man who was called upon to E exercise his discretion. The court held that the licensee had transferred to his manager a discretion which he himself ought to have exercised, and, in those circumstances, he was liable for the acts of the manager. There has been no such conduct in this case. The collector, according to the terms of the documents which have been exhibited, was to help F in the carrying on of a credit betting business. He chose to use part of the apparatus or equipment supplied to him for that purpose for the quite different and, indeed, opposite purpose of carrying on, so far as his premises were concerned, a ready money betting business.

In our opinion, the learned recorder was right, and this appeal ought G to fail.

SWIFT, J. : I agree.

GODDARD, J. : I agree.

Appeal dismissed with costs.

Solicitors : *F. Venn & Co.*, agents for *Walter Moon*, Town Clerk of Liverpool (for the appellant) ; *James Turner & Son* (for the respondent).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

R. v. LEACH.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Swift and du Parcq, JJ.), **December 18, 1936.**]

A *Criminal Law—Reckless or dangerous driving—Indictment of manslaughter—Verdict of guilty of reckless or dangerous driving—Whether distinction in degree of negligence—Road Traffic Act, 1930 (c. 43), s. 11—Road Traffic Act, 1934 (c. 50), s. 34.*

B The appellant was indicted at the Central Criminal Court, charged with manslaughter. By the Road Traffic Act, 1934, s. 34, it is enacted that, on an indictment of manslaughter in connection with the driving of a motor vehicle, the jury can bring in a verdict of driving to the public danger under the Road Traffic Act, 1930, s. 11. The accused was driving his car along a road on a dark night when he collided from behind with a young woman, causing her injuries from which she died. The accused did not know that he had struck anybody at all. He was driving at a speed of about 20 miles per hour with side lights only. In his summing up to the jury, the judge referred to the opinion that if a person by reckless driving kills another the proper verdict is a verdict of manslaughter. "I apprehend," he continued, "that what Parliament intended [by the Road Traffic Act, 1930, s. 11] was this, that there might be cases where a man was driving a motor car in a dangerous manner, and then had the misfortune to kill somebody, where nevertheless a jury might think, either having regard to the age of the accused or for some reason or other, there were circumstances which would justify the jury in returning a less serious verdict":—

D HELD: the direction to the jury in the summing up was adequate and correct.

[EDITORIAL NOTE. The provisions of the Road Traffic Act, 1930, s. 11, have caused a little difficulty, since, if the facts come within the section, they would justify a verdict of manslaughter. The intention of the legislature in providing for a lesser verdict by that section was not clear, and it had been suggested that a lesser degree of negligence was the determining factor. The summing up, so far as it goes, rebuts this suggestion; but the present case while it throws some light on the question, can hardly be regarded as finally determining the question raised. The matter was argued at great length in *R. v. Stringer*, [1933] 1 K.B. 704; Digest Supp., but the point here raised was not precisely determined.

F AS TO RECKLESS OR DANGEROUS DRIVING, see HALSBURY Supp., Street and Aerial Traffic, para. 683; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 222a-222j.]

G APPEAL from a verdict of guilty of driving to the public danger in accordance with the Road Traffic Act, 1930, s. 11, as amended by the Road Traffic Act, 1934, s. 34, returned at the trial of the appellant before MACNAGHTEN, J., at the Central Criminal Court on Nov. 13, 1936, the appellant having been indicted for manslaughter of one Lily Trubshaw.

H On the night of Oct. 1, 1936, the appellant was driving his motor car along Swakeleys Road in the direction of Uxbridge. It was dark at the time and the lights carried by the appellant consisted of side lights and a nearside head light which was dipped. The appellant had turned a corner and was driving along a straight portion of the

road. Both at the police court hearing and at the trial at the Central Criminal Court the appellant contended that at no time did he see any person in that road, nor did he know that he had touched or collided with any person. It was proved that the appellant's car first brushed the skirt of a pedestrian who was walking close to the near side of the road in the same direction as that in which the appellant was travelling. Then, instead of keeping to the roadway, on which there was no other traffic, he drove his car with his nearside wheels 27 inches away from the edge of the road with the car ploughing through a hawthorn hedge planted on the side of the road for a distance of about 35 feet. After driving through this hedge and after having proceeded another 10 or 11 feet, while turning out from the side he struck the deceased who was walking in the direction of Uxbridge. The deceased was dragged under the car, the back wheels passing over her head, and sustained injuries from which she died in a few hours. The sight and hearing of the deceased were perfectly good, and there was evidence to the effect that the only lights carried by the appellant were very dim side lights. At the Central Criminal Court the appellant was found guilty of driving to the public danger and was sentenced to four months' imprisonment. He appealed against conviction on the grounds that there was an improper direction of the jury as to what constituted the offence of dangerous driving and as to what constituted the offence of manslaughter.

The Road Traffic Act, 1930, s. 11, provides :

(1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable—

(a) on summary conviction to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding four months, and in the case of a second or subsequent conviction either to a fine not exceeding one hundred pounds or to such imprisonment as aforesaid or to both such fine and imprisonment;

(b) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine.

The Road Traffic Act, 1934, s. 34, provides :

Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under sect. 11 of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of sect. 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence.

W. A. Fearnley-Whittingstall for the appellant : The Act of 1930 makes dangerous driving an offence, and the jury found the defendant guilty of dangerous driving. The direction to the jury was wrong, the degree of negligence for manslaughter and the degree of negligence to maintain a charge of dangerous driving are not the same. There is a difference between the degree of negligence necessary to constitute

driving to the public danger and the degree of negligence which has an utter disregard for the life of people and which is necessary to constitute the offence of manslaughter. This difference in degree should have been submitted to the jury, and it never was. The Act of 1934 A merely gave juries the right, when failing on an indictment of manslaughter to return a verdict of manslaughter, to bring in a verdict of driving to the public danger. This does not mean that dangerous driving necessarily supports a charge of manslaughter. The passing of the Act of 1934 shows that there is a difference in degree by virtue of B this special provision.

G. D. Roberts, for the Crown, was not called upon.

LORD HEWART, L.C.J. : This appellant was indicted at the Central Criminal Court on a charge of manslaughter and was convicted of dangerous driving under the Road Traffic Act, 1930, s. 11, as amended by C the Road Traffic Act of 1934. He was sentenced to 4 months' imprisonment and his licence was suspended for 5 years. The ground of this appeal is that there was no proper direction in law and that there was D no evidence fit for the jury. So far as evidence is concerned, the appellant was driving about 10.30 on an October night, and while so doing he drove down a woman from behind, his speed being about 20 miles per hour and his car carrying only side lights. He never saw the woman before or after he collided with her. The road had narrowed and the appellant's car had been driven some 30 feet through a hawthorn hedge on the E nearside of the road. The appellant at first denied that his car had knocked down the deceased. The judge in his summing up used the following passages :

Down to the year 1930 there was no provision in our law dealing adequately with F the case of persons driving motor cars in a dangerous manner on the public highway, and in cases where such dangerous driving led to no untoward result, a person driving a car dangerously along the road so as to imperil the safety of the other persons using the road, as the law then stood, was not readily amenable to criminal jurisdiction, but in 1930 Parliament thought fit to pass the Road Traffic Act of that year, and by sect. 11 of that Act it provided that any person driving a motor car along a road recklessly, or at a speed, or in a manner which is dangerous to G the public, having regard to all the circumstances, the place, the nature, condition and user of the road, and the amount of traffic and so forth, should be guilty of an offence, and 4 years later Parliament thought fit to provide that upon the indictment of a person for manslaughter in connection with the driving of a car by him it should be lawful for the jury if they were satisfied that he was guilty of an offence under sect. 11 of the principal Act, to find him guilty of that offence. Some persons have criticised the later Act on the ground that if a person is driving a motor vehicle on the highway recklessly, or in a manner dangerous to the public, and H while he is so driving that car he kills anyone on the road, then that, by the common law of England, is manslaughter, and that therefore if a jury is satisfied that a man is driving a car dangerously and while so driving kills somebody the proper verdict is a verdict of manslaughter. Well, I apprehend that what Parliament intended was this, that there might be cases where a man was driving a motor car in a dangerous manner, and then had the misfortune to kill somebody, where nevertheless a jury might think, either having regard to the age of the accused—because a person who is as young as 17 is at liberty to drive motor cars—

or for some reason or other, there were circumstances which would justify the jury in returning a less serious verdict. Be that as it may, on this indictment it is open to you to return a verdict of guilty of manslaughter, or guilty of dangerous driving, or not guilty. . . . It is not, of course, for every act of ordinary negligence to which all mortal men and women may be subject ; it is not for that sort of negligence that a man is to be held guilty in this court ; it must be a degree of negligence which far transcends the negligence which may make a person answerable in damages in the civil courts, and I know of no better definition than that contained in the section of the Act of 1930 which I have read to you, and I give you this direction in law : if, in your opinion, on the facts proved before you, on this night, the prisoner was driving his motor car recklessly or in a manner dangerous to the public, having regard to all the circumstances of the case, if you are satisfied of that, then the offence of manslaughter has been committed, although at first the accused asserted that he had met with no accident at all, that he had not seen or knocked down any person. It has been conclusively proved before you that it was his motor car which knocked down this young woman . . . and . . . to go along a road with lights so dim that you cannot even see a person whom you have knocked down and that you go on unconscious that you have done so—it is for you to say whether that is not driving a motor vehicle recklessly and in a manner dangerous to the public. . . .

In our opinion the summing up was adequate and correct, and on this evidence the jury might have come to the view that there was sufficient evidence that the appellant was driving in a manner dangerous to the public and to support the charge of manslaughter. The appellant is fortunate in not being convicted of manslaughter.

SWIFT, J. : I agree, and I have nothing to add.

DU PARCQ, J. : I also agree.

Solicitors : *Bird & Lovibond* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* HENRY WESTLAKE, ESQ., *Barrister-at-Law.*]

**Re BULMER, GREAVES v. INLAND REVENUE
COMMISSIONERS.**

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
January 15, 1937.]

A *Bankruptcy—Committee of inspection—Members—Limited company—Proxy—Fiduciary position.*

G. had attended the meetings of a bankrupt's committee of inspection as the holder of a general proxy from a limited company, one of the bankrupt's creditors, which had been appointed a member of the committee. At the time of the receiving order, the bankrupt was entitled to certain shares which were pledged with a bank as security for a loan. G. purchased these shares from the bank and some of them he resold. It was sought to recover for the benefit of the bankrupt's estate such of the shares as G. retained and the proceeds of sale of such shares as G. had sold, on the terms of repaying to G. the price he had paid to the bank for the shares:—

C **HELD:** (i) G. was under the duties and obligations of a member of a committee of inspection, and was therefore in a fiduciary position in relation to the bankrupt's estate and to those interested in the estate.

(ii) even though G. did not appreciate that there was any reason why he was not free to buy as an ordinary purchaser or that in fact the shares were shares which belonged to the estate, the shares retained by G. and the proceeds of the shares resold could be recovered for the benefit of the bankrupt's estate, upon the terms of repaying to G. the price he had to pay the bank for the shares.

(iii) the equitable principles applied to persons in a fiduciary position were applicable to the liabilities of G. in such circumstances, and such application was not limited by the Bankruptcy Rules.

E *Appeal from the decision of CLAUSON and FARWELL, JJ., sitting as the Divisional Court in Bankruptcy ([1936] 3 All E.R. 611), dismissed.*

F **[EDITORIAL NOTE.** The fiduciary relationship of a member of the committee of inspection has long been settled, but the facts of the present case are a little peculiar in that the member of the committee was such as a representative of a limited company. The decision in this case proceeds upon the footing that the representative of the company had deliberately placed himself in the position of a member of the committee and must therefore be treated as such. The questions how far a limited company can be a members of the committee of inspection and the rights and remedies as between a delegate-member and the company he represents are not discussed in the present case; but the point is taken without success that the liability of a member of the committee of inspection is limited by the Bankruptcy Rules and that in this case the ordinary equity doctrine applied to persons in a fiduciary position is ousted by the statutory rules.

G AS TO THE POSITION OF MEMBERS OF THE COMMITTEE OF INSPECTION, see HALSBURY, Hailsham Edn., Vol. 2, p. 161, para. 214; and FOR CASES, see DIGEST, Vol. 4, pp. 241, 242, Nos. 2287-2299.]

Case referred to:

H (1) *Re Geiger*, [1915] 1 K.B. 439; 4 Digest 242, 2288.

APPEAL from a judgment and order of a divisional court of the Chancery Division, consisting of CLAUSON and FARWELL, JJ., delivered on Nov. 12, 1936, and reported in [1936] 3 All E.R. 611.

On Feb. 25, the bankrupt, Sir James Richard Bulmer, deposited

with the National Provincial Bank a certificate for 15,000 preference shares in Smith, Bulmer & Co., Ltd. On July 7, 1927, he deposited with the bank 425,000 ordinary shares in the same company. On July 18, 1927, Branch Nominees, Ltd., nominees of the bank, were registered as holders of the ordinary shares. On Sept. 30, 1929, the appellant, A Mr. Alfred Greaves, was appointed director and chairman of the company, at the suggestion of the bank. On Feb. 16, 1931, Branch Nominees, Ltd., were registered as holders of the preference shares. On Feb. 9, 1932, a receiving order was made against the bankrupt, and, on Feb. 29, the bank lodged a proof in bankruptcy for £56,000, the value of the B securities being estimated as £31,000.

On Mar. 2, 1932, the first meeting of creditors took place. Mr. Swallow, a respondent, was appointed trustee in bankruptcy, and Smith, Bulmer & Co., Ltd., together with Mr. Flather and Mr. Williams, were appointed members of a committee of inspection. On Apr. 6, 1932, the company C appointed Mr. Greaves to be its general proxy on the committee, and he attended meetings as its representative. Sir James Bulmer obtained his discharge on July 11, 1933. On Feb. 14, 1934, Mr. Greaves purchased 15,000 preference shares (the value of which had been reduced), and 150,000 ordinary shares, for £1,125 from the nominees of the bank, at D the suggestion of the bank manager. No suggestion of bad faith was ever made against any of the persons concerned. The shares were never discussed by the committee, and Mr. Greaves never received any information from the trustee, or as a result of his representing the company on the committee; he never saw the bank's proof of debt. E The commissioners of inland revenue, preferential creditors, obtained an order in the Bradford county court, requiring the appellant to transfer to the trustee in bankruptcy the shares which he still retained, and to account for the proceeds of the shares sold, receiving back the price which he paid to the bank. F

On appeal to the divisional court, the learned judges confirmed the judgment of the county court judge. They did not consider the question of whether a limited company could properly be appointed a member of a committee of inspection, but they took the view that Mr. Greaves had placed himself quite deliberately in the position of a member of G the committee, and he could not now claim to be absolved from the duties and obligations of that position. They regarded as well settled the principle that members of a committee of inspection are in a fiduciary position in relation to the bankrupt's estate.

The appellant appealed, and the trustee in bankruptcy was joined H as a co-defendant by leave of the Court of Appeal given at the hearing.

R. F. Roxburgh, K.C., and *P. B. Morle* for the appellants.

Sir Gerald Hurst, K.C., *J. H. Stamp*, and *Gerald Upjohn* for the commissioners of inland revenue and the trustee in bankruptcy.

Roxburgh, K.C. : The appellant should not be treated as though he had been duly elected a member of the committee of inspection ; and, even if he was a member, he is not liable to surrender the shares to the trustee in bankruptcy. The committee of inspection is created by statute, with powers and disabilities defined by statute. It had no existence before the statute, therefore it is not governed by general equitable principles. No disabilities attach to one of its members in regard to a transaction such as this, except those laid down in the statute. Even if there are other disabilities, the respondents are not entitled to enforce them ; they are not a *cestui que trust*, for there are no provisions of the statute which make the committee trustees or fiduciary agents of the creditors or the trustee in bankruptcy.

A company cannot be appointed a member of a committee of inspection under the Bankruptcy Act, 1914, s. 20. It must first give a general proxy, and then the proxy must be elected a member. Mr. Greaves never purported to be a member of the committee, but only to be the general proxy of a member, and even that he could not be at law. He cannot, therefore, be saddled with the liability of a member. Even if the general rules of equity apply, the position of a clerk or servant is totally different from that of the principal. A fiduciary relationship existing between a member of the committee and some principal does not necessarily extend to all that member's clerks. To put a sub-agent in a fiduciary relationship to a principal, he must know that he is dealing with something in respect of which his principal stood in a fiduciary relationship to the ultimate principal, and he must have obtained some confidential information. Neither of these conditions was satisfied in the present case.

ROMER, L.J. : If a bank acts as a trustee, can one of its officers make a private profit out of the trust ?

Roxburgh, K.C. : The bank would be liable to account for his profit to the beneficiary ; but there is no privity of contract nor equitable obligation as between the sub-agent and the bank's principal. An officer of the bank may not use information which he acquires in acting on its behalf, but he may make a profit which does not in any way depend on knowledge acquired by him in his fiduciary position. The Bankruptcy Act and Rules are a complete code. It is true that in *Re Geiger* (1) LORD COZENS-HARDY, M.R., said, at p. 447 :

The statute is full of provisions recognising the fiduciary position of members of a committee of inspection and imposing restrictions upon their powers, none of which would apply to a sole creditor.

That case, however, was merely concerned with the question whether or not the committee of inspection could consist of a single creditor. That observation, read in its context, only means that those sections of the Act which recognise the fiduciary position of a committee cannot be applied to a sole creditor. It would be a great hardship if a man,

who had merely attended a committee meeting as a representative, were forced to refund property he had afterwards purchased in complete ignorance.

Sir Gerald Hurst, K.C., was not called upon.

LORD WRIGHT, M.R.: This is an appeal from a divisional court consisting of CLAUSON and FARWELL, JJ., sitting in bankruptcy, who confirmed the judgment of His Honour JUDGE McCLEARY in the county court at Bradford, sitting in bankruptcy. There was at one time a question whether the proper parties were before the court, because the motion was originally drawn in the name of the commissioners of inland revenue, who are very large creditors of the debtor's estate, and it does not seem that the motion could have been properly dealt with unless the trustee in bankruptcy had also been before the court. But I need not stop to discuss the exact position in that respect, because the trustee has now been added, and, in my opinion, beyond any doubt, he is the proper person to take these proceedings, as representing the estate, and as representing the general body of the creditors.

The debtor owed a considerable sum of money to the National Provincial Bank; he also owed money to other creditors, and, in particular, something like £80,000 or £90,000 arrears of tax to the commissioners of inland revenue. What the court is concerned with in this motion is a certain block of preference and ordinary shares in a company called Smith, Bulmer & Co., Ltd. They were substantial creditors, and, as such, they, with two others, were appointed, in due course of the bankruptcy, as members of the committee of inspection under the Bankruptcy Act, 1914, s. 20. A gentleman called Mr. Swallow was appointed trustee in Mar., 1932, and two other gentlemen, Mr. Flather and Mr. Williams, were appointed members of the committee, and the third was Smith, Bulmer & Co., Ltd. I am not going to consider whether it is possible to appoint a limited company as a member of a committee of inspection under the Bankruptcy Act, 1914, s. 20. I have the gravest doubt whether any such appointment is valid, but, as I shall explain a little later, it is not really necessary to decide that. The company itself could not, of course, act on the committee of inspection. It appointed Mr. Greaves, the respondent on the action, as its proxy, as its general agent to represent it on the committee. Mr. Greaves was chairman of Smith, Bulmer & Co., Ltd. He, in the course of the bankruptcy, purchased on his own account, and paid for on his own account, a certain number of shares, 15,000 10s. preference shares and 150,000 1s. ordinary shares in the company. He bought them from the bank, who held them as part security for the debt which the debtor owed to them. When I say they were held by the bank as security, they were held according to the ordinary course of business by nominees called Branch Nominees, Ltd.,

- but for all practical purposes they were bought from the bank. As between the bank and Mr. Greaves, no question arises, and I say nothing more about that. As to the knowledge which Mr. Greaves may or may not have possessed on the question of who owned these particular shares,
- A or, rather, who owned the equity of redemption of these shares, no decision need be arrived at in that matter because, as will appear later, the decision appealed from is based on the view that, at the date of the purchase, Mr. Greaves was perfectly innocent. It is quite clear that, if he had exercised his mind on the question, he must have realised that
- B these shares, in all human probability, were shares the mortgagor of which was the debtor, but, as the evidence stands, he did not exercise his mind upon it, and, therefore, the matter must be dealt with on the footing that he was perfectly innocent of knowledge in that respect at the time of the purchase.
- C In these circumstances, the law has to be considered, and two main questions have been debated. One is whether Mr. Greaves, by acting as he did, as general proxy to the company, Smith, Bulmer & Co., Ltd., at the various meetings of the committee of inspection, is on the same footing as if he had himself been a member of the committee, and the
- D other is, if he is to be treated as being in that position, what are his liabilities, in respect of the purchase which he has effected of those shares, the equity of redemption in which formed part of the insolvent estate ?

- On the first question, it appears that very little argument was directed
- E to that before the divisional court. The judgment of the divisional court says this (p. 613) :

- It was somewhat faintly suggested, both before the county court judge and in this court, that, in those circumstances, the appellant was not under the duties and obligations which by law attach to membership of the committee of inspection, but the county court judge, in our view quite properly, dealt with the matter on the footing that in the circumstances the appellant was under those duties and obligations. The appellant placed himself quite deliberately in the position of a member of the committee, and it is too late for him now to claim to be absolved from the duties and obligations attaching to that position.
- F

- I entirely agree with that view, and, indeed, I do not think it necessary to add anything further to it. Treating the appellant, therefore, as being
- G under the same duties and obligations as if he were a member of committee of inspection, it is necessary now to consider what those duties and obligations were. Under the Bankruptcy Act, 1914, s. 20, provision is made for the creditors qualified to vote, at their first or any subsequent meeting by resolution, to appoint a committee of inspection for the
- H purpose of superintending the administration of the bankrupt's property by the trustee. That means that they are appointed for the purpose of carrying out, or rather assisting the trustee in carrying out, the administration and the realisation of the insolvent's property, and they are, therefore, in the position of trustees for sale. Now, taking that

definition of their functions and their duties, it would appear, on general equitable principles, that they would be, like any other trustees in that position, debarred from buying or trafficking in the trust property, and, therefore, they would come within the general rule which is stated in LEWIN ON TRUSTS, 11th Edn., p. 564. The learned author there says, A what is perhaps a commonplace :

The rule is now universal, that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property—

that is to say, the purchase by a trustee of any part of the trust property— B

If a trustee were permitted to buy in an honest case, he might buy in a case having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise.

That is the general rule, and, treating Mr. Greaves as occupying that position, it would seem to follow, almost as a matter of course, on general principles, that the trust property, the property belonging to the insolvent estate, was an area denied to him for purposes of trafficking or purchasing, and completely denied to him. That is the view which has been taken by the learned county court judge and by the judges of the divisional court in this case, and I do not gather—subject to an argument with which I shall deal in a moment, no doubt an argument which has to be carefully considered—that the proposition is seriously disputed, as a general proposition of equity, by Mr. Roxburgh. There does not seem to be any very precise authority on the question of the exact position of members of the committee of creditors, but reference has been made to the case of *Re Geiger* (1), a case which did not raise the question in a form exactly the same as that in which it now has to be considered, but in that case LORD COZENS-HARDY, M.R., said, at p. 447 : C D E

The statute is full of provisions recognising the fiduciary position of members of a committee of inspection and imposing restrictions upon their powers, none of which would apply to a sole creditor. F

I emphasise the word “recognising” there, because obviously LORD COZENS-HARDY, M.R., does not treat the conclusion as depending on any express statement in the statute that the members of the committee of inspection were in a fiduciary position. It seems to me to follow *ex necessitate* from the description of their functions, which I have just read, and on that basis the divisional court has made the order with which I shall deal in a moment. G

What has been argued very strenuously by Mr. Roxburgh is this. He says the committee of creditors is the creation of statute, and you have to look at the statute, or rather, to the statutory rules made to give effect to the statute, to see exactly what is the ambit of its duties and liabilities, and that, beyond the express definition and limitation of those duties and liabilities, the court will not go, and there is no room H

for the application of those general equitable principles which otherwise would normally be applied by the court to persons in the fiduciary position charged with such duties as the statute by sect. 20 imposes upon them. With the greatest respect to his argument, I cannot give effect to it. The Bankruptcy Rules, 1915, rr. 347 and 348, do, indeed, contain certain specific provisions as to certain consequences which may follow from any breach of the particular matters forbidden by those rules. Rule 347 says :

B Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the court on the application of the Board of Trade or any creditor.

C That rule obviously is limited to a trustee or a member of the committee. It is limited to the particular case of purchasing any part of the estate, and it gives a particular potential remedy to be exercised by the court, but I see no reason at all to treat it as intended to be exhaustive, and I see no reason to think that even the remedy which is stated in the final words is intended to be exhaustive, even in the cases referred to expressly in the rule. Equally in r. 348 (2) :

E No member of a committee of inspection of an estate shall, except under and with the sanction of the court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services. . . . If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this rule, they may disallow such payment or recover such profit, as the case may be, on the audit of the trustee's account.

F There, again, it is impossible, I think, to treat that remedy as being intended to be exhaustive ; it is merely giving a convenient administrative method of dealing with the particular problem which the rule concerns. These rules are made merely to give effect to the general provisions of the Act. They do not cut down the general provisions of the Act. They are not intended to be exhaustive. All that is said is that they are not to extend the jurisdiction of the court. I refer to sect. 132, which contains the rule-making power. They do, however, recognise that the members of the committee of inspection are in a fiduciary position, and to that extent they support the case which is made on behalf of the bankrupt's estate.

H It is scarcely necessary to say that it follows, from that view, that the appellant has been properly held liable in the way in which the court has held him to be liable to account. The decision of the divisional court and of the county court, as I have said, proceeds on the footing that Mr. Greaves had not a specific knowledge present to his mind as to the ownership of the shares, and that has, in the present case, only

this consequence : that it affects the extent of the order which the court ought to make, and which the court has made, in this case. The matter is very clearly dealt with in the judgment of the divisional court in this passage (pp. 614, 615) :

If he [Mr. Greaves] did not know that the shares formed part of the estate, the court, while requiring him (subject to his lien for the price paid) to hand over shares retained, would not call upon him to replace the shares realised while he was in this state of ignorance.

That would be the appropriate remedy if he knew at the time that the property was the property of the estate. He would then be compelled to restore it, or to pay adequate compensation if he failed to restore it.

It would be content to require him to account for the purchase money actually received for the shares which he resold. His ignorance would absolve him from blame for reselling the shares, and would protect him from the full measure of relief which the court would have exacted had he throughout known the facts. But as soon as the facts are drawn to his attention it is against conscience for him to retain the benefits which he has acquired by an act which, on ascertaining the acts, he must be taken to know to be unconscientious, and the court purges his conscience by taking from him the profits actually made.

I completely agree with that statement of the position, and I think the appeal ought to be dismissed. I will only add, in respect of one argument which has been addressed, that this conclusion puts no unfair burden on a person in Mr. Greaves' position of a member of the committee of inspection. All he has to do, in a case of this sort, is to make full disclosure, or, if necessary, ask the sanction of the court. He must make full disclosure if he knows of the circumstances, because otherwise he is failing in his duty to act independently and conscientiously in the fair realisation of the estate. Of course, if he does not know, then the only burden which falls upon him afterwards is that he is compelled by law to give back the advantages which he had no right to acquire, and therefore has no right to retain, as soon as his conscience is affected by knowledge of the facts. The appeal will be dismissed.

ROMER, L.J. : I entirely agree, and I want to add only this. Mr. Roxburgh, at the conclusion of his argument, submitted that, even though Mr. Greaves occupied a fiduciary position in this matter, nevertheless the trustee in bankruptcy was not a person who could recover from him any profit that he might have obtained out of the transaction which we have been investigating, nor was any individual creditor. That no individual creditor could obtain an order for the refunding of any profit may be conceded—I express, at any rate, no opinion about it ; but if any such profit has been made, as it has in this case, then that profit belongs to the estate of the bankrupt, divisible amongst his creditors. Consequently, the right person to recover that profit, if made, is the trustee in bankruptcy.

GREENE, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Greaves & Greaves*,
Bradford (for the appellants); *Helliwell & Co.*, agents for *John R.*
 A *Farrar*, *Halifax* (for the respondent).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

B

DOBBIN v. WALDORF TOILET SALOONS, LTD.

[MANCHESTER MICHAELMAS ASSIZES (Mr. Commissioner Procter),
December 12, 14, 1936.]

C

Negligence—Hairdresser—Permanent waving—Bleached hair—Duty to exercise care.

D

The plaintiff, who was in the habit of bleaching and dyeing her hair herself, was, upon her own instructions, given a permanent wave by a servant of the defendants. Bleached hair becomes brittle and devitalised. No warning was given to the plaintiff of the risk attached to a permanent wave of bleached hair, and, without testing one or two curls first, the defendants' servant put 20 curls into the heaters at the same time. Five heaters were removed and put on to other curls and the 15 curls which had already been heated were heated again. Upon removal of the heaters the plaintiff's hair fell off for the most part leaving short strands. In the instructions issued by the manufacturers with regard to the process of permanent waving were the words "do not attempt to permanent wave over-bleached hair without testing for heat a few curls in the most difficult part":—

E

HELD : the work was done in a negligent and unskilful manner and the defendants were liable to the plaintiff in damages.

F

[**EDITORIAL NOTE.** This case is purely illustrative of the application of the law of negligence to an everyday operation and is reported only for the guidance of practitioners having to deal with similar facts.

AS TO THE DEGREE OF CARE REQUIRED, see *HALSBURY*, *Hailsham Edn.*, Vol. 23, pp. 582-584, para. 835; and FOR CASES, see *DIGEST*, Vol. 36, pp. 19, 20, Nos. 87-90.]

G

ACTION for damages for negligence in respect of a "permanent waving" operation.

H

The plaintiff, who was in the habit of bleaching and dyeing her hair herself, was, upon her own instructions, given a "permanent wave" by a hairdresser employed by the defendants. He was, in fact, her regular hairdresser. 25 "curlers" and 20 "heaters" were used in the operation. Upon their removal the plaintiff's hair fell off for the most part, leaving strands some 2½ ins. long.

Mrs. Dobbin was obliged to seek skilled treatment for her hair. She was a business woman and was obliged to buy temporary curls, and later a transformation for £21. It would take a period estimated at

from 12 to 18 months for her hair to grow sufficiently for her not to need the transformation.

Edward G. Hemmerde, K.C., and G. Jessel Rycroft for the plaintiff.
William Gorman, K.C., and Denis Gerrard for the defendants.

A

MR. COMMISSIONER PROCTER : The plaintiff employed the defendants to perform upon her hair an operation known as a "permanent wave." For years she had bleached her hair. Words which have been used in connection with it during the course of the trial are "brittle," "de- B
 vitalised," "denatured."

"It should never have been heated at all," were the words of the defendant's Dr. Mumford.

The defendants had a duty to warn ; they had no right to go on with the operation unless they had done this. The question is, was C
 any such warning given. I have heard the defendants' Mr. Heron give evidence, and find that no warning was given. I accept the plaintiff's evidence wholly upon that. Even if I were wrong in accepting her evidence, the defendants still had a duty to exercise reasonable care where there was such danger as in the present case. Did they in fact D
 do so ? No test was made with one or two curls before putting 20 curls into the heaters. In the instructions issued by the manufacturers with regard to this process of permanent waving are words, "Do not attempt to permanent wave over-bleached hair without testing for heat a few curls in the most difficult part." I do not believe such a test was ever E
 made. The hairdresser was negligent. His negligence did not cease there. After putting in 20 heaters, he took out five and put them into another place. Then he heated again the 15 curls which had been heated already and the five which had not. This was negligence, and I find it was the cause of this trouble. The work done was done in a F
 negligent and unskilful manner, and the plaintiff must have damages. There is a sum of £35 special damages. I award £135 13s. in all, with costs.

Solicitors : *Lloyd & Davies*, Manchester (for the plaintiff) ; *James Chapman & Co.*, Manchester (for the defendants).

G

[Reported by M. D. CHORLTON, *Barrister-at-Law.*]

COATES v. RAWTENSTALL BOROUGH COUNCIL.

[MANCHESTER MICHAELMAS ASSIZES (Mr. Commissioner Procter),
December 15, 21, 1936.]

A *Negligence—Licensee—Infant—Recreation ground.*

The defendant council maintained a children's recreation ground, upon which were devices for the amusement of children, and, *inter alia*, a chute or children's slide. The infant plaintiff, aged $3\frac{1}{4}$, and a boy aged 14, while sliding on the chute, collided with a chain which had improperly been fixed across the chute by another child, the plaintiff receiving serious injuries. The chain was used, with others, to prevent the use of the chute on Sundays, and was kept padlocked to a pole at the recreation ground. It was found that the recreation ground attendant had negligently failed to secure the chain to the pole, whereby a child had been able to remove it. In an action for damages, the defendant council contended that the recreation ground was provided for children of school age only and that the plaintiff was a trespasser:—

C **HELD:** (i) as no steps were taken to prevent children of tender age from using the recreation ground, in the absence of bye-laws regulating the use of the ground, the plaintiff was not a trespasser.

(ii) as the defendant council had allowed to exist upon its premises a concealed danger which was not apparent to the plaintiff, and which, if it was not known, ought to have been known, to the defendant council, the defendant council was guilty of a breach of its duty to the plaintiff as an ordinary licensee.

D (iii) the defendant council had failed to take reasonable steps to ensure that the infant licensee was not exposed to an exceptional danger.

(iv) the plaintiff was not an invitee.

E **[EDITORIAL NOTE.]** This case is expressly decided on the footing that the infant plaintiff was a licensee and was not entitled to any further right than those of any ordinary licensee. It was not thought necessary to have recourse to the additional rights, if any, that the plaintiff might have by reason of his tender age.

F AS TO POSITION OF LICENSEE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 610-612, paras. 860-863; and FOR CASES, see DIGEST, Vol. 36, pp. 46-49, Nos 288-306.

AS TO DUTY TO CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 69-71, Nos. 442-462.]

Cases referred to:

- G** (1) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; Digest Supp.
 (2) *Purkis v. Walthamstow Borough Council* (1934), 151 L.T. 30; Digest Supp.
 (3) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; Digest Supp.
 (4) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K. B. 398; 36 Digest 38, 223.

H **ACTION** for damages for negligence resulting in personal injury to the infant plaintiff.

The defendant council maintained a recreation ground at Crawshaw-booth, Rawtenstall, known as the Hawthorn Recreation Ground, upon which were devices for the amusement of children, and, *inter alia*, a chute, or children's slide. The infant plaintiff, a boy aged $3\frac{1}{4}$, collided with

a chain which had been put, quite improperly, across the lower part of the chute. Apparently this was the act of another child, who had found the chain unsecured. In consequence of the accident, the plaintiff fractured his thigh. Infantile paralysis later developed. At the time of the accident, the infant plaintiff was in charge of his cousin, a boy A aged 14. It was contended on behalf of the defendant council that the chute was intended for school children, and that so young a boy was a trespasser.

William Gorman, K.C., and *Edgar Lustgarten* for the plaintiff.

Wilfrid Clothier, K.C., and *Hartley Shawcross* for the defendant council. B

MR. COMMISSIONER PROCTER : The plaintiff Peter Douglas Coates, an infant, and his father, Richard Douglas Coates, bring this action to recover damages for negligence from the Rawtenstall Borough Council. The defendant authority maintains a children's playground known as C the Hawthorn Recreation Ground, at Crawshawbooth, Rawtenstall. It is installed with amusement devices for children, and one of these devices is a chute down which children slide. On July 5, 1935, the plaintiff, then aged 3½ years, went with his cousin, Rex Booth, a boy of 14 years, to the recreation ground. They went up the steps to the chute. Booth D sat on the chute with the child between his knees, and they slid down the chute. When they got nearly to the bottom, Booth saw a chain across the chute. He put his feet out to stop himself and the other child's legs went underneath the chain, which caught his thigh, and they were both violently stopped, and the child had Booth's weight thrown against his E back and he was seriously injured. The chain was one of the chains used by the defendant council to prevent the chute being used on Sunday. Walter Woodridge, the attendant at the recreation ground, called by the defendant council, says that there are 6 chains used by him for this purpose on the various devices. On Saturday night he says he places 3 of the F chains around the slide of the chute at spaced intervals, and he places a further chain at the top of the steps to the chute. On Monday morning he unlocks the chains and places 5 of them around a pole device known as the "Ocean Wave." He laces one lot of 3 chains together, and, after winding them around the pole, places a padlock through the rings and G locks the padlock. He takes the same course with another lot of 2 chains. The sixth chain he takes home. Formerly he used to take 6 chains home to his cottage 100 yds. away, but he says that was heavy work, and his superior allowed him to lock the chains around the pole. He says it is his job to see that the playground is in proper order ; that he is the H attendant at two grounds, Loveclough and Hawthorn grounds, but he has a lot to do at the Loveclough ground, and cannot pay much attention to the Hawthorn ground ; the only time he visits the latter ground is at 8 p.m. and 10 p.m. each night. He says that he knew if he left chains

- lying about boys would play with them, and he was not surprised that boys should fasten the chain round the chute, where it was at the time of the accident, after seeing him do it at the week-ends. He says every night at 10 p.m. he looked to see if the chains were around the pole, and that to the best of his knowledge they were safe once he locked them. He says he visited the ground at 8 p.m. on the day of the accident. The accident had happened before 5 p.m., but he did not know of it. He says he went to see if any mischief was being done, meaning mischief to the equipment, and he was concerned if boys were getting into mischief.
- A He later heard of the accident, and visited the Hawthorn ground at 9.45 p.m. He went to the pole of the "Ocean Wave" and found 4 chains only around it, in two groups of 2 each, each group being locked by a padlock, and he found the missing chain in the grass at the back of the chute. He says that later he heard Jack Law, one of the plaintiff's
- C witnesses, say that he saw a boy named Aspin fastening the chain around the chute. Jack Law admits he made that statement. Law says, too, that on a prior occasion he saw one chain being thrown about by boys in the playground. The evidence of the witness Walter Woodridge completely failed to satisfy me that the chain which caused the plaintiff's
- D injuries was ever securely locked, as alleged by him. It is hard to believe that a chain which had been padlocked could have been abstracted from its group, and harder still to believe that any person who may have abstracted it would take the trouble to wind the other two chains around the pole and again lock them with the padlock. I am satisfied, after seeing
- E Woodridge in the witness box, that I cannot rely upon his evidence as to locking the chain, although I am satisfied that he realised that the chain was a potential source of danger if left lying about or not secured, and that boys, after seeing the use it was usually put to, might place it in its position on the chute. It was elicited from Woodridge that the
- F boy Aspin, who had been seen to place the chain around the chute, was in court. It would have been interesting to learn from him where the chain was when he got possession of it. But he was not called.

- The infant plaintiff's case is that he was an invitee, to whom the duty is I think clearly laid down in *Addie (R.) & Sons (Collieries) v. Dumbreck* (1), at p. 365, and that he was injured by the defendant council's breach of that duty. Alternatively, it is said that, if he was not an invitee, then he was a licensee, and the defendant council failed to discharge its duty to him as a licensee, whereby he was injured. The defendant council contends first, that the infant plaintiff was a trespasser.
- H The council says the recreation ground was provided for children of school age only, and that the chute was obviously dangerous to children of tender age. If this is so, it seems curious that no steps were taken to prevent children of tender age from using the ground and the chute. It is to be observed that the plaintiff is not complaining that the chute in

its normal state caused the injury. The complaint is that the chute was dangerous with the chain across it. As there was no mention, at the hearing, of the existence of any bye-laws regulating the use of the playground, I assume there are none. I fail to see how it can reasonably be contended that a child of tender years, when he enters this public A playground and uses a device there provided, becomes a trespasser. He was, in fact, in the care of his cousin, Rex Booth, a very intelligent boy of 14 years of age, and both of them were caught by this chain through no fault of Booth. The chute is approached by steps to a platform at the top. The chain does not appear to become visible to a person using the B chute until he is in a sitting position at the top of the slide. In any event, Booth could not reasonably have been expected to have seen or known of the presence of the chain until he commenced the descent. I am satisfied the infant plaintiff was not a trespasser.

The defendant council secondly contends that, if in fact the infant C plaintiff was not a trespasser, then he was a licensee, and the council relies upon *Purkis v. Walthamstow Borough Council* (2) as showing that children using public recreation grounds are licensees. In that case, SCRUTTON, L.J., said, at p. 32 :

It is not easy to decide in the case of a local authority providing a recreation D ground whether it licenses or invites.

He goes on later :

The authority is liable if it provides "traps" . . . It would be liable for defective or dangerous premises or implements for play.

GREER, L.J., said, at p. 33 :

It was open to counsel for the plaintiff to go to the jury on his contention that the boy was an invitee or a permittee and not merely a licensee. On the other hand I think, on the admitted facts of the case, he was a licensee, and the only duty on the defendants was their duty to him as such licensee.

And MAUGHAM, L.J., said, at p. 35 :

The public have a right to go there, and to that extent they are not mere licensees ; and it seems to me a natural conclusion that it is the duty of the local authority to do something more than what I may describe as that arising from the cold neutrality of a land owner who allows persons to visit his property.

LORD HAILSHAM, L.C., in *Addie (R.) & Sons (Collieries) v. Dumbreck* G (1), said, as to licensees, at p. 365 :

The occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

The trap in this case was the chute with the chain attached. The defendant council did not bring those two objects together, but the council's servant left the chain in the playground unsecured, when he knew that mischievous boys would be likely to play with it, and he would H

not have been surprised if boys had fastened it to the chute where it was fastened. He clearly knew that a loose chain was a potential danger, and he knew of the use to which it was likely to be put, and he was negligent in leaving that chain unsecured. The intervention of the boy

- A Aspin was a link leading from Woodridge's initial act to the subsequent injury. Woodridge ought reasonably to have anticipated intervention by mischievous boys, and to have foreseen that failure to secure the chain would lead to the mischief that happened: *Liddle v. North Riding of Yorkshire County Council* (3), at p. 123. If it cannot be said that a
- B trap was created by the defendant council, it was created by reason of the negligence of the council's servant. In any event, I am satisfied, and I so find, that the council did allow to exist upon its premises a concealed danger which was not apparent to the infant plaintiff, nor to the boy in whose care he was, and that if it was not known it ought to have
- C been known to the defendant council.

I find that the defendant council was guilty of a breach of its duty to the plaintiff as a licensee, and that the injury and damage suffered by the plaintiff were caused by that breach of duty. I have come to this conclusion solely on the basis of the infant plaintiff being in the category of an

- D ordinary licensee of adult age. I think that the duty of the licensor to an infant licensee is greater than the duty to an adult licensee. There is no duty to make the premises absolutely safe before an infant licensee enters upon them, but I think there is a duty to take reasonable care that the child is not unreasonably exposed to exceptional dangers.
- E See SALMOND ON TORTS, 9th Edn., p. 537. The defendant council clearly failed in that duty. At the risk of repetition, however, let me make it perfectly clear that my decision as to the liability of the defendant council has been arrived at, first, by confining the category to which the plaintiff belongs, that is, the category of licensees, and then
- F confining his rights strictly to the rights of an ordinary licensee. As laid down by LORD HAILSHAM, L.C., in *Addie (R.) & Sons (Collieries) v. Dumbreck* (1), if his claim had not survived that test as it has, I should still have been prepared to find that the defendant council was liable in damages for its breach of duty to take reasonable steps that the infant
- G licensee was not exposed to an exceptional danger. In coming to my decision, I have not failed to consider the contention raised by the defendant council upon the judgment of HAMILTON, L.J. (as he then was), in *Latham v. Johnson (R.) & Nephew, Ltd.* (5), where he says, at p. 419:

- H One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or only licensed. There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be.

It was urged upon me that the chain was not inherently dangerous. The answer to that argument seems to be, first, that the chattel in this

case is the chute with its chain attached, and that there was inherent danger in that chattel; and, secondly, there was an inherent danger in the chain in the state in which the defendant council suffered it to be, that is, attached to the slide of the chute.

In the circumstances of this case, taking into consideration the plaintiff's age and the nature of the device on which he was injured, I find myself unable to come to the conclusion that the infant plaintiff in this case was an invitee.

Judgment for plaintiff for £1,500 with costs.

Solicitors: *Procter & Son*, Burnley (for the plaintiff); *Oddie & Roebuck*, Blackburn (for the defendant council).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

SUTHERLAND PUBLISHING CO., LTD. v. CAXTON PUBLISHING CO., LTD. (No. 2)

[CHANCERY DIVISION (Crossman, J.), **November 5, 6, 10, 11, 12, 13, 16, 17, 18, 19, 20, 1936, January 14, 1937.**]

Copyright—Infringement—Conversion—Limitation of action—Assessment of damages for conversion—Copyright Act, 1911 (c. 46), s. 10.

In an action for an alleged infringement of the plaintiffs' copyright in a certain publication, the plaintiffs claimed, *inter alia*, an inquiry as to (i) damages suffered by reason of the infringement, and (ii) damages for conversion. The defendants admitted the infringement and submitted to an inquiry as to what damages the plaintiffs had suffered, but they relied upon the Copyright Act, 1911, s. 10, and the Statute of Limitations in answer to part of the plaintiffs' claim:—

HELD: (i) the expression "an action in respect of copyright" in the Copyright Act, 1911, s. 10, was wide enough to cover the plaintiffs' claim for damages for conversion, and that claim was therefore limited to acts of infringement within 3 years before the issue of the writ.

(ii) the act of infringement was the printing of the infringing copies.

(iii) the conversion, at the date of which the value of the infringing copies was to be assessed was the first act of conversion after the infringing copies came into existence, and in the present case this was the order to the binders to bind the unbound sheets, which contained the infringing copies.

(iv) the value of the infringing copies was to be assessed by ascertaining the sale price of the bound volume and, after deducting the cost of binding, estimating the proportion of the remainder attributable to the infringing copies.

[EDITORIAL NOTE.] The previous proceedings in this case reported in [1936] 1 All E.R. 177 dealt with the question whether damages both for infringement and conversion could be recovered. The present proceedings deal in the first place with the period of limitation to be applied in each case. It is admitted that the 3 year period prescribed by Copyright Act, 1911, s. 10, applies to an action for infringement and here it is held that it applies in the case of the conversion here complained of. The point whether it applies to every case of conversion is, however, left open for future consideration. A further point is the assessment of damages for conversion

and in this matter the case of *Ash v. Dickie* (1) is distinguished, a distinction being drawn between conversion by reproduction in a newspaper and conversion by reproduction in a book.

AS TO THE LAW ON THESE POINTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 591-593, paras. 917-919; and FOR CASES, see DIGEST, Vol. 13, pp. 219-220, Nos. 565-573.]

Cases referred to :

- (1) *Ash v. Dickie*, [1936] Ch. 655; [1936] 2 All E.R. 71; Digest Supp.
- (2) *Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd.*, [1936] Ch. 323; [1936] 1 All E.R. 177; Digest Supp.
- (3) *Fraser v. Swansea Canal Co.* (1834), 1 Ad. & El. 354; 38 Digest 126, 927.
- (4) *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] Ch. 489; [1936] 2 All E.R. 1496; Digest Supp.
- (5) *Read v. Brown* (1888), 22 Q.B.D. 128; 1 Digest 13, 107.
- (6) *Goding v. Ferris* (1791), 2 H. Bl. 14.
- (7) *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; 32 Digest 327, 136.
- (8) *M'Combie v. Davies* (1805), 6 East, 538; 43 Digest 494, 332.
- (9) *Morison v. London, County & Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 34 Digest 132, 1011.
- (10) *Reckitt v. Barnett, Pembroke & Slater, Ltd.*, [1929] A.C. 176; Digest Supp.
- (11) *The Arpad*, [1934] P. 189; Digest Supp.
- (12) *Hollins v. Fowler* (1875), L.R. 7 H.L. 757; 43 Digest 471, 102.
- (13) *Oakley v. Lyster*, [1931] 1 K.B. 148; Digest Supp.
- (14) *The Koursk*, [1924] P. 140; 42 Digest 976, 72.
- (15) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 36 Digest 8, 9.
- (16) *John Lane The Bodley Head, Ltd. v. Associated Newspapers, Ltd.*, [1936] 1 K.B. 715; [1936] 1 All E.R. 379; Digest Supp.
- (17) *Miller v. Dell*, [1891] 1 Q.B. 468; 43 Digest 487, 236.

ACTION for an injunction, for an inquiry as to damages for infringement of copyright and for conversion, and for delivery up of all infringing material.

The plaintiffs, the Sutherland Publishing Co., Ltd., were the publishers of and the owners of the copyright in a work entitled "Heating and Ventilating." The defendants, the Caxton Publishing Co., Ltd., were the publishers of a work in three volumes, entitled "The Modern Practical Plumber," part of Vol. 3 of which the defendants admitted constituted an infringement of the plaintiffs' copyright. The defendants offered to submit to an injunction and to an inquiry as to what damages the plaintiffs had suffered and to pay the costs, but they relied on the Copyright Act, 1911, s. 10, and the Statute of Limitations in answer to part of the plaintiffs' claim. A preliminary point of law had been argued as to whether the remedies in damages for infringement and for conversion under the Copyright Act, 1911, ss. 6 and 7, were cumulative or alternative. The Court of Appeal held that these damages were cumulative (see [1936] 1 All E.R. 177).

K. E. Shelley for the plaintiffs.

Hon. S. O. Henn Collins, K.C., and *E. J. Macgillivray* for the defendants.

Shelley : The only question of fact in dispute is the proportion of the defendants' work which infringes the plaintiffs' copyright. The plaintiffs say it is one seventh. The cost of producing "The Modern Practical Plumber" is irrelevant. It is conceded that damages for infringement under sect. 6 are limited to infringement within 3 years before the issue of the writ, but under sect. 7 the plaintiff can go back the full 6 years. Time runs from the sale. Damages should be assessed by taking the sale price of the book, estimating what proportion of the value of the book is represented by the infringing matter, and applying that fraction to the price. In so far as damages for infringement depend on loss of sales by the plaintiffs, a corresponding number of sales must be struck out of the sales relied on as giving damages for conversion. A B

This action is in substance an inquiry as to damages. The pages cannot be split up and the words and letters counted. There are about 20 infringing pages in the defendants' work. It would be erroneous to count the 20 pages as being merely equal to the other pages. They should be counted as double, and the fraction will then be one seventh. The actual number of words that infringe is one twenty-sixth, but that is an entirely erroneous method of calculating the damage. [Counsel referred to *Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd.* (2), *Ash v. Dickie* (1), *Fraser v. Swansea Canal Co.* (3), and *Ash v. Hutchinson & Co. (Publishers), Ltd.* (4).] C D

Henn Collins, K.C. : Copyright being wholly contained in a statute, if the remedy seems to fall short, it is because the statute so intended. Unless the plaintiff can show that someone has invaded his sole right given by the Act he has no remedy against anyone. It is not true that sect. 7 provides a new and independent action. The remedies are cumulative and not mutually exclusive. Against the actual infringer the plaintiff has a cause of action and at that stage he has to prove (a) that he is the owner of the copyright and (b) that there has been an infringement. If he then wants a remedy against someone who is not the actual infringer he has to prove those two preliminary facts and something else in addition. The cause of action is not to be confounded with the remedy. The cause of action does not change with the relief that it claims : *Read v. Brown* (5). The right given by sect. 7 cannot exist apart from infringement. Whatever step is taken you are always thrown back on sect. 1 (2) of the Act, which defines the territory. The infringement in sect. 10 is the invasion of his right upon which the plaintiff must rely in order to get his remedy. The legislature must have had some reason for prescribing a three years' period. Sect. 10 therefore applies to the plaintiffs' claim in respect of conversion. E F G H

From what act or fact does the time run ? I say from the first printing. The question here is, what is the conversion ? If sect. 10 applies the time runs from the printing, that being the whole and sole

incursion into the plaintiffs' private territory. The time is 3 years after any printing between May 2, 1932, and May 2, 1935.

A The conversion is when the defendants change the nature of the plaintiffs' chattels, the printed sheets, into a book, i.e., when the defendants bind them. This act fixes the commencement of the period and the date on which the value of the chattel has to be estimated: *Goding v. Ferris* (6), *Fraser v. Swansea Canal Co.* (3). This case shows that time runs from the first unlawful act. The first act of the defendants in relation to the plaintiffs' goods after they came into existence was the giving of the order to bind. A plaintiff can never get accretions to his property subsequent to the act of conversion: *Wilkinson v. Verity* (7). The real test of the value of the chattel is what it costs to produce. The plaintiffs have got compensation for every copy that they ought to have sold; the court will therefore be careful to see that the plaintiffs are not recompensed twice under the guise of conversion. [Counsel referred to the judgment of GREENE, L.J., in *Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd.* (2).]

D Macgillivray, following on the same side: In ascertaining the proportion copied, there is no reason to take the page as the unit: one must take what is actually copied. The only test is the actual printed matter—the word-space—and this amounts to one twenty-sixth. Any exercise of dominion over the goods inconsistent with the rights of the true owner is enough to constitute conversion. In the case of *Ash v. Dickie* (1), as it was a newspaper, there was no question of binding; and because there was nothing between the printing and the sale, the sale was held to be the act of conversion. The court there had no material upon which to consider this question of binding. *M'Combie v. Davies* (8) shows that assuming to oneself the right of disposing of another man's goods is a conversion, and in this case, therefore, the binding is the act of conversion from which the period begins to run: see *Morison v. London, County & Westminster Bank, Ltd.* (9), *Reckitt v. Barnett, Pembroke & Slater, Ltd.* (10). The goods converted were the unbound sheets; and as to their value, there can be no better test than what the plaintiffs actually paid for them, and what they would have had to pay for them again if they had been destroyed; that is, the cost of paper and printing. If there had been a purchaser, all he would get would be the bare material and not the right to publish it. See the dissenting judgment of SCRUTTON, L.J., in *The Arpad* (11). [Counsel referred to *Hollins v. Fowler* (12), *Wilkinson v. Verity* (7), *Oakley v. Lyster* (13).]

H *Shelley*, in reply: In *Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd.* (2), LORD WRIGHT, M.R., at p. 335, says:

The Copyright Act, 1911, must be considered with reference to the relevant law relating to conversion . . .

When the draftsman puts into the Act the word "conversion", he is

putting in all the law relating to conversion : to that extent it is quite untrue to say that the law of copyright is contained entirely in the statute.

There is no such thing as "the sole right of the plaintiff." See the judgment of GREENE, L.J., in *Ash v. Hutchinson & Co. (Publishers), Ltd.* A (4), at p. 506. GREENE, L.J., there says in so many words that the plaintiff has a large variety of sole rights ; and the defendant does not commit one tort in two aspects, but two separate torts. Sect. 1 (2) is a mere compilation of rights. Sect. 7 confers on the plaintiff an entirely different right. The clue to this section is the word "accordingly." It B is a completely independent code of its own, providing its own right, and then saying "you may enforce it under the ordinary law of the land." It is incorrect to say that sect. 7 provides a merely alternative remedy.

The defendants say that under sect. 7 the plaintiffs must prove that the copies in question are infringing copies, and then further prove certain C facts which must also be proved when seeking relief under sect. 6. "Therefore," they say, "the two actions are not independent, but interdependent." But "interdependent" means nothing until it is shown exactly how the actions are interdependent. The accident that essential parts of the proof are the same in the two actions does not affect the D meaning of the Act itself. *The Koursk* (14) shows that, even where the essential proof is the same, the second action is not barred by the judgment in the first action. The damage also was identical in both cases. Actionable negligence requires proof of injury ; damage is an essential ingredient in the action for negligence : *Heaven v. Pender* (15). There E fore, returning to *The Koursk* (14), the cause of action in the first case was the same as in the second, yet they were independent. There need be no act of infringement in order to found an action under sect. 7. Because in some actions under sect. 7 it is no part of the action to prove infringement, and because you must limit sect. 10 to cases where there is F necessarily an act of infringement, therefore sect. 10 cannot apply to sect. 7. Turning to sect. 35, the language is not "any copies made or imported in infringement of copyright," as it might have been : it is "made in contravention of this Act." It is much wider language, and cannot be limited to sect. 2. The provisions of sect. 8 are G inapplicable to the case of the innocent bookseller. They would be even more inapplicable to the case of the innocent importer. Sect. 8 cannot apply to an action under sect. 7 ; and it would be most strange to say that sect. 10 applies to sect. 7, notwithstanding that sect. 8 does not. Under sect. 8, if the innocent bookseller proves H that at the date of the printing he had no conception either of the original work or of the fact of the printing, no action can be brought against him. *John Lane, The Bodley Head, Ltd. v. Associated Newspapers, Ltd.* (16). Where the defendant is entirely innocent, only

A an injunction can be granted against him, and this cannot hurt him very much. To summarise: The words "an action in respect of infringement" mean in their ordinary sense "an action in which relief is claimed, by reason of some infringement by the defendant." In an action under
B sect. 7, no relief is claimed by reason of any act of infringement, and neither the defendant nor anyone else need have committed any act of infringement. Therefore the words in their ordinary meaning do not
C cover an action under sect. 7. It is suggested that the true meaning of these words "an action in respect of infringement" is an action in which
D proof of infringement is an essential factor in order to obtain relief, and that therefore these words cover an action under sect. 7. But an action under sect. 7 will lie in some cases without any act of infringement by anyone; therefore these words cannot include every action under sect. 7: and the presence of the additional words "the infringement" makes it
E plain that sect. 10 cannot apply to sect. 7. If sect. 10 applies to sect. 7, the similar words in sect. 8 must also apply to sect. 7. In that case the innocent bookseller, who has no knowledge either of the original work or of the infringing copies at the date when the latter are made, is not liable either in conversion or detainue, but apparently is liable to an
F injunction, which is a wholly inappropriate remedy. It is incorrect to say that if there are two or more separate acts of conversion the plaintiff must rely upon the first act only. See *Miller v. Dell* (17). The order to bind cannot be a conversion at all. It may be a trespass at the highest. In respect of any copies bound within 6 years, the plaintiffs can elect as to which act they will proceed upon: *Wilkinson v. Verity* (7). Nor is the delivery of the sheets by the printer and the acceptance of them by the defendants a conversion. The only act that might be a conversion is the delivery to the public: *Ash v. Hutchinson & Co. (Publishers), Ltd.* (4).
Henn Collins, K.C., in reply.

CROSSMAN, J.: In this case the plaintiffs, who are the owners of the copyright in a book entitled "Heating and Ventilating," claim against the defendants, who are the publishers of a book in three volumes entitled "The Modern Practical Plumber," an injunction restraining the
G defendants from infringing the plaintiffs' copyright in "Heating and Ventilating," and an inquiry as to damages suffered by the plaintiffs by reason of the defendants' infringements and conversion by their publication of the third volume of "The Modern Practical Plumber," and payment of the amount due, and delivery up of all infringing books
H and material.

The writ in the action was issued on May 2, 1935, and the statement of claim was delivered on May 3, 1935. The defendants, by their defence, which was delivered on May 24, 1935, admitted that the third volume of "The Modern Practical Plumber" constituted an infringement of

the plaintiffs' copyright in parts of "Heating and Ventilating," and, while relying on the Copyright Act, 1911, s. 10, and the Statute of Limitations, they offered to submit to a limited judgment on their admissions. This offer is stated in paras. 5, 6 and 7 of the defence, and is as follows :

5. The defendants offer to submit to judgment for an injunction as claimed, and to an inquiry as to what parts of the plaintiffs' said book have been reproduced in the defendants' said book, and as to what damages the plaintiffs have suffered by the infringement by the defendants of the copyright in their said book which are recoverable in this action, or alternatively as to what damages the plaintiffs have suffered by the conversion of infringing copies of parts of their said book which are recoverable in this action.

6. The defendants offer to extract from each and every copy of their said book now in their possession or control, and to deliver up to the plaintiffs, all such parts as shall be found to have been reproduced from the plaintiffs' said book, and all plates used or intended to be used for the reproduction of the same.

7. The defendants offer to pay the costs of this action, up to and including the costs of a motion for judgment and of any order to which the plaintiffs may be entitled on this defence, the costs of the inquiry (if ordered) being reserved.

But questions arose as to what the plaintiffs were, on the defendants' admissions, entitled to. The first question was whether the plaintiffs were entitled both to damages for infringement under the Copyright Act, 1911, s. 6 (1), and to damages for conversion under sect. 7 of the Act. The second question, which arose only if the first was answered in the affirmative, was whether the limit of time of 3 years provided for by the Copyright Act, 1911, s. 10, applies to a claim for conversion under sect. 7. FARWELL, J., on Nov. 6, 1935, decided the first question in the negative, and did not deal with the second question. The Court of Appeal on Feb. 7, 1936, reversed the decision of FARWELL, J., on the first question, and held that the remedies given to the owner of copyright by sect. 6 (1) and sect. 7, respectively, of the Copyright Act, 1911, are cumulative, and not alternative, but did not decide the second question. In these circumstances, I have now to decide what damages the plaintiffs are entitled to. This is substantially an inquiry as to damages, which would in ordinary circumstances be referred to chambers. But the inquiry involves the decision of certain questions of law, and the parties have requested me to deal with it, in order to avoid the expense and delay of a reference to the master, and references back to the court to determine the questions of law, and probably, in the end, an application to the court to vary the master's certificate.

The parties have agreed certain documents, and I think that, when the questions of law are determined, there should be no difficulty, with the assistance of these documents, in determining the amount of the damages.

Having regard to the decision of the Court of Appeal given in this action on Feb. 7, 1936, I proceed on the basis that the remedies given by sect. 6 (1) and sect. 7 respectively of the Copyright Act, 1911, are cumulative, and not alternative, and that, though (as LORD

WRIGHT, M.R., pointed out in his judgment in that case) in some cases there may be an overlapping of the damages under the two sections, there are two separate and diverse causes of action, each of which must receive appropriate consideration.

- A The claim for damages under sect. 6 is a claim for a wrong done to an incorporeal right, that is to say, copyright, the measure of damages being the depreciation caused by the infringement to the value of the copyright, while the claim for damages under sect. 7 is a claim for conversion of particular chattels, the infringing copies, the measure of damages being the value of the infringing copies which, by force of the statute, are deemed to be the property of the plaintiff from the mere fact of being brought into existence. The first question which I have to determine is whether the plaintiffs' claim for damages for conversion of the infringing copies under sect. 7 of the Act is (as the claim for damages for infringement of copyright under sect. 6 of the Act clearly is), affected by sect. 10 of the Act, which provides that :

an action in respect of infringement of copyright shall not be commenced after the expiration of 3 years next after the infringement.

- This question depends upon the construction of the Act, and for the purpose of determining it I have to look at the group of sects. 6 to 10 which are grouped under the heading "Civil remedies." Counsel for the plaintiffs contended that sect. 10 means : "an action, so far as it is an action in respect of infringement of copyright, shall not be commenced after the expiration of 3 years next after the infringement," and that the present action, so far as it is an action for damages for conversion of infringing copies, is not an action in respect of infringement of copyright. He pointed out that, by reason of the definition of infringing copies in sect. 35 (1) of the Act, which enacts that in the Act, unless the context otherwise requires, "infringing," when applied to a work in which copyright subsists, means any copy, including any colourable imitation made or imported in contravention of the provisions of the Act, there may be infringing copies to which sect. 7 applies without there having been any act of infringement. For instance, if a copy of a copyright work made in the United States of America, as to which the owner of the copyright has given notice to the commissioners of customs and excise under sect. 14 of the Act, is imported into the United Kingdom by an innocent person in contravention of sect. 14, it becomes, under the definition in sect. 35, an infringing copy, but there has been no infringement of copyright within the meaning of the Act. Counsel for the plaintiffs argued that, even if the expression "an action in respect of infringement of copyright" in sect. 10 is wide enough to include proceedings in respect of the conversion of infringing copies under sect. 7, it would be wrong so to construe the expression, in view of the fact that sect. 10 fixes the time of limitation by reference to "the

infringement," and there may be, in one state of circumstances, at all events, proceedings under sect. 7 without there having been any infringement. In this action, however, the defendants have infringed the plaintiffs' copyright, and, in my judgment, the expression "an action in respect of infringement of copyright" in sect. 10 is wide enough to cover the plaintiffs' claim in this action for damages for the defendants' conversion of the infringing copies of the plaintiffs' work, and, in the circumstances, I do not think that the fact that there may be some other state of circumstances, in which the claim for damages for conversion under sect. 7 may arise without there having been any infringement of copyright, is sufficient ground for holding that sect. 10 does not apply to the plaintiffs' claim in this action for damages for conversion under sect. 7. I hold, therefore, that the Copyright Act, 1911, s. 10, applies to the plaintiffs' claim for damages for conversion under sect. 7, as well as to their claim for infringement of copyright under sect. 6. If I am right as to the first question, time runs against the plaintiffs on their claim for damages for conversion from what is referred to in sect. 10 as "the infringement," and this, in the present case, is, in my judgment, the printing by the defendants of the infringing copies of Vol. III of "The Modern Practical Plumber." I hold, therefore, that the plaintiffs' claim for damages for conversion under sect. 7 is limited to copies printed within 3 years before the issue of the writ in this action, that is to say, since May 2, 1932.

It is common ground that the measure of damages for conversion under sect. 7 is the value of the infringing copies at the date of the conversion, and the next question which I have to determine is, what is the act of conversion at the date at which the value of the infringing copies must be ascertained? The defendants say that either the order given by them to their printers and binders to bind the unbound sheets of "The Modern Practical Plumber," or the acceptance by the defendants of the delivery by their printers and binders of the completed volume, is the material act of conversion. The plaintiffs say that the delivery by the defendants of the completed volume to their purchasers is the material act of conversion.

The "infringing copies" became the property of the plaintiffs by force of sect. 7 of the Act, from the mere fact of being brought into existence. In my judgment, the "infringing copies" in the present case are the parts of the unbound sheets of Vol. III of "The Modern Practical Plumber" on which the printers, by the order of the defendants, printed the passages copied from "Heating and Ventilating." In my judgment, the conversion, at the date at which the value of the infringing copies must be assessed, is the first act of conversion after the infringing copies came into existence. The question, therefore, is, what was the first act which the defendants did, after the infringing copies came into

existence, which amounted to a conversion of them ? Merely allowing the printer to remain in possession of the infringing copies was not, in my judgment, a conversion, since it was not necessarily adverse to the plaintiffs. But the order to the binders to bind the unbound sheets
A which contained the infringing copies into the bound copies of Vol. III of "The Modern Practical Plumber" was, in my judgment, a conversion of the infringing copies, and not a trespass only, because it was a dealing with the chattels which necessarily implied an intention on the part of the defendants to assert a right which was inconsistent with the right
B of the plaintiffs. The case of *Ash v. Dickie* (1), where the sale by the defendant company of its newspaper was held to be the conversion, is, in my opinion, distinguished from the present case by the fact that in that case nothing was done by the defendant company between the printing of the newspaper which constituted the infringement and the
C sale.

The next question is, what was the value of the infringing copies, that is to say, the parts of the unbound sheets of Vol. III of "The Modern Practical Plumber" on which the passages copied from "Heating and Ventilating" were printed, at the time when the order to the printer
D to bind the unbound sheets was given. In my judgment, the proper method of arriving at the value of the infringing copies is to treat them as forming part of what ROMER, L.J., in *Ash v. Dickie* (1), at p. 670, called "the composite chattel," and to assess the value of "the composite chattel" as a whole, and then to estimate what proportion of
E that value ought to be attributed to the infringing copies. In my judgment, the contention of the defendants' counsel that the basis on which the value of the unbound printed sheets ought to be assessed is the cost of the paper and printing, or the price which the printer received for them, is wrong. As LORD WRIGHT, M.R., said in *Ash v. Dickie* (1),
F at p. 663 :

In estimating damages for conversion the question is not what it has cost to produce the article, but what the article is worth.

In my judgment, the only way in which I can put a value upon the unbound printed sheets is to ascertain what they fetched when bound
G and sold, and what it cost to bind them, and to deduct the cost of binding from the sale price, and on this basis I assess the value of the unbound printed sheets at 20s. a set. In my judgment, the proportion of that value which ought to be attributed to the infringing copies ought not to be arrived at either by the word method contended for by the
H defendants or by the leaf method contended for by the plaintiffs. The oral evidence which I have heard does not assist me in arriving at that proportion. In my judgment, the proportion can be estimated only by an examination of the books, and, after looking at the books and considering the agreed documents, I estimate the proportion at one-

twentieth. Exercising what LORD WRIGHT, M.R., in his judgment in *Ash v. Dickie* (1), at p. 664, called *rusticum judicium*, I assess the plaintiffs' damages for conversion under the Copyright Act, 1911, s. 7, at £150.

I have now to consider what damages, if any, the plaintiffs have suffered by reason of the defendants' infringement of the copyright in A
 "Heating and Ventilating," and how far these damages are covered by
 the damages which I have awarded to the plaintiffs for the defendants' B
 conversion of the infringing copies. The measure of damages is the
 depreciation caused by the infringement to the value of the copyright, C
 the infringement being limited to the printing by the defendants of B
 infringing copies of Vol. III of "The Modern Practical Plumber" since
 May 2, 1932. The damages may consist (i) of loss by the plaintiffs of
 sales of copies of "Heating and Ventilating," and (ii) of injury to the
 reputation of the plaintiffs as the publishers of "Heating and Ventila-
 ting." The only evidence which I have on the first head is the material C
 contained in agreed document A, and, on this evidence, I do not find
 that the plaintiffs have suffered any loss of sales, and I cannot award
 them anything more than nominal damages on this head. On the
 second head, I infer from the evidence that the plaintiffs have suffered D
 in reputation from the fact that the book "Heating and Ventilating" D
 published by them contains passages which are practically identical
 with passages in the larger and more comprehensive book, "The Modern
 Practical Plumber," published by the defendants, the natural conclusion
 being that the larger and more expensive book is the original; and I
 assess the damages which the plaintiffs have suffered in this way at £50. E
 These damages are independent of the damages which I have awarded
 to the plaintiffs for the defendants' conversion of the infringing copies,
 and I hold that the plaintiffs are entitled by way of damages to £150
 as well as £50.

Solicitors: *White & Leonard & Nicholls & Co.* (for the plaintiff F
 company); *Oswald Hickson, Collier & Co.* (for the defendant company).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

EVANS v. DELL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 13, 1937.]

A *Street Traffic—Stage carriage—No road service licence—Separate payments by passengers—Owner's ignorance of use to which vehicle put—Road Traffic Act, 1930 (c. 43), ss. 61, 72 (1), (10)—Road Traffic Act, 1934 (c. 50), s. 25.*

B A dance was organised, and the advertisement thereof in a newspaper contained the words "Bus to Chesham after dance." The organisers arranged to hire a 20-seater motor-coach from the respondent to take passengers to Chesham after the dance for the price of 15s., which sum was paid on a date after the dance. The respondent was unaware of the terms of the advertisement, and did not know that during the dance one of the organisers announced that any person who desired to travel by the coach to Chesham must buy a ticket at the door of the hall, and that tickets were issued to those persons, who each contributed not less than 6d. Any person attending the dance, although not a member of the club which organised it, could obtain a ticket. An information was preferred in two separate cases by the appellant against the respondent, under the Road Traffic Act, 1930, s. 72 (1), (10), for permitting the motor vehicle to be used as a stage carriage otherwise than under a road service licence. The justices dismissed the information, holding that the coach was being used, not as a stage carriage, but for the conveyance of a private party on a special occasion. The appellant contended that, as the driver of the vehicle was in possession of a work ticket as required by statute, the respondent must have known that separate payments were to be made by each passenger, and he therefore deliberately abstained from making inquiries regarding the fares, and whether there had been any advertisement in the newspapers :—

E HELD : the vehicle was being used as a stage carriage, but, as the respondent was unaware of the use to which it was being put, he was not guilty of the offence charged. The only element which prevented the use of this vehicle being innocent was that the possibility of using the vehicle had been advertised to the public.

F [EDITORIAL NOTE. It is clear from the decision in this case that the offence of using a vehicle as a stage carriage is one in which *mens rea* must be proved. This will not absolve a person who wilfully shuts his eyes to the plain facts of the case, nor one who is put upon inquiry and fails to make proper inquiries. On the other hand the owner who has no knowledge of being guilty of improper uses of the coach does not commit any offence.

G AS TO STAGE CARRIAGES, see HALSBURY Supp., Street and Aerial Traffic, para. 612 ; and FOR CASES, see DIGEST Supp., Street and Aerial Traffic, Nos. 76e-76p.]

Case referred to :

(1) *Goldsmith v. Deakin* (1933), 50 T.L.R. 73 ; Digest Supp.

H APPEAL by way of case stated from a decision of justices for the county of Buckingham. The facts and the arguments are set out in the judgments.

Valentine Holmes and Helenus Milmo for the appellant.

W. A. L. Raeburn for the respondent.

LORD HEWART, L.C.J. : These are two cases stated, which, although

they differ in immaterial particulars, raise in substance the same question. I will deal, therefore, with the first of the two cases. This case is a case stated by justices for the county of Buckingham, and arises out of an information preferred by a traffic examiner for the traffic commissioner of the metropolitan traffic area under the Road Traffic Act, 1930, s. 72 (1), (10), against the respondent for permitting, on Dec. 14, 1935, a motor vehicle to be used as a stage carriage otherwise than under a road service licence. The justices, having heard the case, dismissed the information, and the question is whether their conclusion could be supported in law. A

The relevant facts may be very briefly stated. A dance had been organised at Amersham for Dec. 14, 1935, and it had in fact, though the respondent was not aware of it, been advertised in a newspaper, the advertisement concluding with the words, "Bus to Chesham after dance." Some days before the dance actually took place, a person, acting on behalf of the organisers, had communicated with the respondent and arranged to hire a 20-seater motor-coach to take passengers to Chesham after the dance. A price of 15s. was agreed upon, and that sum was handed to the driver of the coach on Dec. 16, that is to say, after the event, for transmission to the respondent. There was what was called a work ticket, the significance of which may be presently mentioned. The case goes on to find that the respondent did not inquire whether any separate charge had been made to the persons using the coach, nor whether the persons using the coach would be members of one private party. He did not make any inquiries as to, or concern himself with, the arrangements which the organisers proposed to make with the persons using the coach. In fact, during the dance, one of the organisers announced that anyone who desired to travel by the coach to Chesham must buy a ticket at the door of the hall, and a number of tickets was issued. No fixed charge was made, but persons desiring to have tickets made a contribution of 6d. or more to the cost of the coach, no one giving less than 6d. More than that, it is found that any persons attending the dance could obtain a ticket, and the tickets were not restricted to members of the club. The paragraph ends with this finding of fact : B

The respondent was not present at the dance and did not hear the announcement as to the bus. C

When the dance was over, one of the organisers inspected the tickets of persons entering the coach, and he stood in the gangway of the coach. No tickets were collected by the driver. Finally, so far as the facts are concerned, the case says : D

The appellant [that is to say, the traffic examiner] produced no evidence that the advertisement in the newspaper or the announcement at the dance was made with the knowledge or authority of the respondent or any agent of his nor was evidence produced to show that such advertisement in the newspaper or announcement at the dance had come to the respondent's notice and we find that such advertisement E

or announcement was not in fact inserted or made by the respondent or his agent and that he had no knowledge thereof.

In those circumstances, it was contended on the part of the appellant that the motor-coach was used as a stage carriage, and that the respondent
A caused or permitted it so to be used. On the part of the respondent, various contentions were made, but, in particular, it was urged that the respondent could not have known the use to which the coach was to be put, and was innocent of the offence charged. Then, coming to the findings of the justices, the first finding is that no separate charges or
B fares had been made and that, therefore, the coach was not used as a stage carriage at all. They find :

That the coach was being used for the conveyance of a private party on a special occasion. (c) That as the respondent had not authorised, and had no knowledge of, any advertisements of the running of the coach, such advertisements did not come within the Road Traffic Act, 1934, s. 25 (1) (b).

C Finally, they express the opinion :

That the respondent did not know that the coach was to be, or was being, used as a stage coach.

Now, this rather complicated legislation, which has become more
D complicated as time goes on, leaves, when it comes to be examined, no real room for doubt as to what a stage carriage is, and what the exceptions are. Stage carriages are defined by sect. 61 (1) (a) of the Act of 1930 as :

motor vehicles carrying passengers for hire or reward at separate fares (any or all of which are less than 1s. for a single journey or such greater sum as may be prescribed), stage by stage, and stopping to pick up or set down passengers along the
E line of route, and any other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages.

Then there is a proviso that a motor vehicle adapted to carry less than 8 passengers shall not be deemed to be a stage carriage in circumstances which do not affect this case. Then comes subsect. (2) :

F It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not,

but there is a proviso which says :

G Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion.

In that state of the law, various questions arose and various decisions are
H given and afterwards, under the Road Traffic Act, 1934, s. 25, it was sought to make plain what conditions were to be fulfilled if the occasion was to be special and if the party was to be private. There is a series of provisions, all of which have to be fulfilled, and, in particular :

(a) arrangements for the bringing together of all the passengers for the purpose of

making the journey as a party must have been made by some person, not being the holder of the public service vehicle licence in respect of the vehicle or a person acting on behalf of the holder of such a licence or a person who receives any remuneration in respect of those arrangements.

There follow other, and possibly less important, provisions, but the section goes on to provide :

(g) The driver of the vehicle must carry a work ticket containing such particulars as may be prescribed for the purpose of enabling the record of the journey made under the last foregoing paragraph to be traced and identified.

Under the law as amended, therefore, it is quite clear that the mere fact that the members of a party make separate payments is not to constitute the vehicle as a stage carriage, if there is a special occasion, and if the party is private. By the later Act, it cannot be correct to say that the occasion is special, and the party private, if, for example, the journey is made after previous advertisement to the public of the arrangements therefor. Now, it is not quite easy to see from the case, as it is stated, whether it was urged in the court below that this respondent in fact knew that this vehicle was to be used as a stage carriage, or that, if he had taken reasonable steps, he must have known, and must, therefore, be deemed to have closed his eyes to it. I cannot help thinking, on the case as stated, that the respondent knew, because, where the justices are dealing with that particular point, in the expression of their opinion, they say that the respondent did not know that the coach was to be, or was being, used as a stage coach, and I am not at all sure that, in this case, the contention was made that a person causes or permits a motor-coach to be used as a stage carriage if he closes his eyes and deliberately refrains from knowing what he might have known, and so voluntarily takes a risk. But it is perhaps fair that the matter shall be decided upon the footing that, wrapped up in the contention that the respondent caused or permitted the coach to be used as a stage carriage, is the contention that he ought to have known, and closed his eyes. The proposition of law which is relied upon for such a contention as that is stated to be derived from the frequently cited, but briefly reported, case of *Goldsmith v. Deakin* (1), which was heard at the time when the Act of 1934 had not yet come into existence. In that case, where it was found as a fact that the respondent had contracted to provide a motor-coach for the purpose of taking parties to a dance and back again, he had also agreed that his driver should collect tickets from the persons using the coach, in order to prevent unauthorised persons from boarding it, and the justices in that case dismissed the information. This court, consisting of AVORY and LAWRENCE, JJ., came to the conclusion that the justices ought to have found the offence proved, and AVORY, J., in the course of his judgment, said this, at p. 74 :

In my opinion, if a person hires out a vehicle in circumstances in which he ought to know that it probably will be or may be used as a stage carriage, and puts his

servant in charge of that vehicle to use it in any way that the hirer may choose to direct the servant to use it, then he is, within the meaning of the statute, permitting it to be used as a stage carriage without the proper and appropriate licence.

A little later, AVORY, J., said this, referring to another case :

A That is really, in effect, the attitude of the respondent in the present case. He was hiring out his coach and putting his servant in charge of it, and at least leaving it to chance whether it would be used as a stage carriage or not. If a man does that he is permitting the vehicle to be used within the meaning of the statute.

That judgment has been more than once considered in this court, and, when one reads it as a whole, not taking out one particular passage and dwelling upon it, but reading all the judgment, it means, I think, that, in circumstances in which the owner of the vehicle is put upon inquiry, if he refrains from making the inquiry, and an offence is committed, the fair inference may be that he permitted the offence to be committed. Now, what are the relevant ingredients in the present case ? I confess I am a little surprised at the finding of the justices that no separate fares or payments had been charged and made, and, therefore, the coach was not used as a stage carriage at all. Speaking for myself, when I look at the payments that were made, and the circumstances in which they were made, I have no doubt that this coach was, on this occasion, being used as a stage carriage. There was an advertisement to the public, and any person who was at the dance could use the coach if he was prepared to buy a ticket, and he was told he must buy a ticket in order to use the coach. I have not the slightest doubt, myself, that this coach was, on this occasion, being used as a stage carriage, but it is a wholly different question to consider whether the respondent knew that it was, or was going to be, so used. What is stated is, if I follow Mr. Milmo's very able argument, that, because there was a work ticket, he must have known that there were going to be separate payments, and that the vehicle was to be used legitimately without a road service licence, for the reason that the party was private, and the occasion was special, and so came within the proviso which I read a few moments ago. Then, the further contention is, that, having the knowledge, or a well founded belief, that there were going to be separate fares, so as to make the provision of a work ticket desirable, the respondent ought to have gone further, and inquired what the arrangements were about the fares, who were going to constitute the party, and, in particular, whether there had been any advertisement in the press. It is said that, on those facts, the inference, not only may, but must, be drawn, that the respondent deliberately refrained from making inquiries, the results of which he might not care to have. I think that is putting the matter too high. The only element in this case which prevented the use of this vehicle from being innocent as falling within the proviso, was that the possibility of using the vehicle had been advertised to the public. That was all. All the rest was consistent with a proper and innocent use of the vehicle

on a special occasion by a private party, and, with regard to that one element, it is expressly found that the respondent himself was not aware of it. In those circumstances, I cannot be satisfied that, as a matter of law, the justices were bound to draw the inference that the respondent, with a guilty mind, refrained from making inquiries, and so committed the offence with which he is charged. Although, therefore, I cannot assent to some parts of the findings that these justices have expressed, I am not prepared to dissent from their conclusion that the information ought to be dismissed. A

With regard to the second case, it is conceded that there is no element which makes it stronger, from the point of view of the appellant, than the first case. There are immaterial differences of detail, the price was less, the number of seats was less, but, to all intents and purposes, the cases stand on the same footing. There also, it seems to me, the justices were entitled, if they thought fit, to dismiss the information. I think, therefore, that each of these appeals fails, and ought to be dismissed. B C

SWIFT, J. : I agree.

GODDARD, J. : I agree. I would like to add a few words on one point. It seems to me that it is quite clear here that the justices came to a conclusion, as they state in terms, that the respondent had no knowledge that his vehicle was being used in contravention of the Act. I can find nothing in the case which suggests either that he did know or that he shut his eyes to the obvious, or that it is even contended that he shut his eyes to the obvious. In those circumstances, it seems to me, in view of that finding of fact, strange that the public authority in this case should have thought that this was a case to be brought to this court, and, when one comes to analyse the argument that is addressed to one, it seems to me that it really comes to this, that the traffic commissioners desired this court to hold, or to see if they could get this court to hold, that *mens rea* is not part of the offence. With the complexity of modern litigation, one knows that there are times when the court is constrained to find that, by reason of the clear terms of an Act of Parliament, *mens rea*, or the absence of *mens rea*, becomes material, that if a certain act is done, an offence is committed whether the person knew or did not know. When one gets complete vindication of the respondent, as in this case, so far as any knowledge of being guilty of using the coach wrongly, I gather there is nothing in this Act that constrains me to hold that, knowledge or no knowledge, he is guilty of the offence. I agree that the appeal fails. D E F G H

Appeal dismissed with costs.

Solicitors : *Treasury Solicitor* (for the appellant); *A. J. Adams & Adams* (for the respondent).

[Reported by MICHAEL MARCUS, Esq., *Barrister-at-Law*.]

Re MESSENGER'S ESTATE, CHAPLIN *v.* RUANE.

[CHANCERY DIVISION (Clauson, J.), January 14, 1937.]

Will—Construction—Intention of testator—Printed form of will—Beneficiary's name inserted—Bequest left blank.

A By his will, which was on a printed form, a testator appointed E. A. C. to be his executor. After providing for the payment of the testator's debts, funeral and testamentary expenses, the will proceeded: "I give and bequeath to E. A. C.":—

B HELD: upon a consideration of the testator's intention expressed in the will, E. A. C. was beneficially entitled to the whole of the testator's estate.

[EDITORIAL NOTE. The home-made will is a frequent source of difficulty. In the present instance the testator has only made one disposition, and in that disposition has omitted to say what property is included therein. It will be noted that here the bequest is to the person who is appointed executor of the will.

C AS TO ABSENCE OF DESCRIPTION OF BEQUEST, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 678, 679, paras. 1293, 1294; and FOR CASES, see DIGEST, Vol. 44, pp. 610, 611, Nos. 4376-4385.]

Cases referred to:

- D (1) *Re Harrison, Turner v. Hellard* (1885), 30 Ch. D. 390; 44 Digest 550, 3684.
(2) *Re Bassett's Estate, Perkins v. Fladgate* (1872), L.R. 14 Eq. 54; 44 Digest 837, 6912.
(3) *Fell v. Fell* (1922), 31 C.L.R. 268; 44 Digest 610, case o.
(4) *Mohun v. Mohun* (1818), 1 Swan. 201; 44 Digest 611, 4378.

E ADJOURNED SUMMONS for the determination of a question arising on the will, dated Nov. 12, 1933, of Frederick Messenger, who died on May 5, 1934. The will, which was on a printed form, was in the following terms:

F This is the last will and testament of me Frederick Messenger of 75 Vernon Road Feltham in the county of Middlesex. I hereby revoke all wills and testamentary instruments heretofore by me made. I appoint Mrs. E. A. Chaplin of 75 Vernon Road Feltham Middlesex and of to be the executors of this my will. I direct my executors to pay my just debts and funeral and testamentary expenses.

I give and bequeath to my daughter Mrs. E. A. Chaplin.

G The will was duly signed by the testator and attested, and the question asked by the summons was:

Whether upon the true construction of the said will the plaintiff is beneficially entitled to the whole of the testator's real and personal estate or whether there is an intestacy in regard thereto.

H *B. S. Tatham*, for the plaintiff, the executrix of the will: The court leans against an intestacy: see *Re Harrison, Turner v. Hellard* (1), and the fact that the testator in this case appointed the plaintiff as his executrix, whereby he vested the whole of his estate in her, goes to show that he intended her to take beneficially. There is no English decision directly in point, though *Re Bassett's Estate, Perkins v. Fladgate* (2),

a well as *Re Harrison* (1), lends support to the plaintiff's claim, but the Australian case of *Fell v. Fell* (3) is almost exactly on all fours with the present case : see particularly the judgment of ISAACS, J., in that case.

Wyndham Jennings, for the defendants, the next of kin of the testator : The defendants are entitled to the whole estate : see *Mohun v. Mohun* (4). A

CLAUSON, J. : The court is always anxious to give effect to a testator's intention, however vaguely expressed.

Wyndham Jennings : But here there is no expression of intention at all. If the testator had said " I give one farthing to Mrs. E. A. Chaplin " he would have died intestate as to the rest of his estate. It is rather illogical that because he leaves her nothing at all, she should take all. B

CLAUSON, J. : The testator in this case was apparently furnished with one of the familiar will forms, and not being furnished, I imagine, with any assistance as to the way of filling it up, he made a will which is in these terms : C

This is the last will and testament of me Frederick Messenger of 75 Vernon Road Feltham in the county of Middlesex. I hereby revoke all wills and testamentary instruments heretofore made by me. I appoint— D

there is then a blank in the form, which the testator filled up so that the will now reads in this way :

I appoint Mrs. E. A. Chaplin of 75 Vernon Road Feltham Middlesex and of to be the executors of this my will.

The will then goes on :

I direct my executors to pay my just debts and funeral and testamentary expenses. E

The form then starts a new paragraph with the words : " I give and bequeath " and leaves a gap after those words. Into that gap the testator has inserted the words : " to my daughter Mrs. E. A. Chaplin." He then signed the will and it was duly attested. In my view it is quite plain from this document that the testator desired to make an effective will, and in that connection I need only refer to the observations of LORD ESHER, M.R., in the case of *Re Harrison, Turner v. Hellard* (1), where he says at p. 393 : F

There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce. G

It is quite plain in this case that the testator intended to dispose of his property, otherwise what he was doing was a solemn farce. Another thing which is perfectly plain is this, that he intended in some way or other to benefit Mrs. E. A. Chaplin. He would not have put her name after the words " I give and bequeath," except with the purpose of benefiting her in some shape or form. In my view, it appears with reasonable clearness on the face of this will that the extent to which he desired to benefit her was to the extent of the whole of his property, H

which he was vesting in his executrix, who happens to be named as beneficiary, by means of appointing her executrix. If I had any hesitation about the matter, it would have been removed by a perusal of the judgment of BACON, V.-C., in *Re Bassett's Estate, Perkins v. Fladgate* (2), and it would have been even more effectually removed by a consideration of the judgment of the High Court of Australia in the year 1922, in the case of *Fell v. Fell* (3), where there is a most elaborate judgment dealing with the whole position in a case of this kind, delivered by ISAACS, J., with whom HIGGINS, J., concurred. That the other side to the question was carefully canvassed appears from the judgments in this case, particularly that of KNOX, C.J., who came to a different decision from the majority decision.

In my judgment the will in this case operates so as to result in the plaintiff being beneficially entitled to the testator's whole estate, and I declare that on the true construction of the will that is my order, following the terms of the summons. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors : *Tamplin, Joseph, Ponsonby, Ryde & Flux* (for the plaintiff) ; *Tucker, Hussey & Co.* (for the defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

KRONSTEIN v. KORDA.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), **January 12, 13 1937.**]

Practice—Statute-barred claim—Failure to deliver reply to defence—Master's discretion—Interlocutory and final appeals—Jurisdiction of Divisional Court.

The plaintiff claimed in 1936 to be indemnified from certain losses, the latest of which accrued to him in 1929, by reason of an agreement made between his predecessor in title and the defendant. The defendant pleaded that the statement of claim disclosed no cause of action which was not statute-barred and the plaintiff did not deliver a reply. The master ordered this issue to be tried as a preliminary point of law. With the consent of both parties, the matter was heard by the same master acting as a special referee. He decided that all claims were statute-barred, and dismissed the action. He also refused to allow the plaintiff to deliver a reply or to have an adjournment. The plaintiff appealed to the divisional court, who held that the statement of claim was ambiguous, and did not allege when any cause of action arose ; and that the master should not have ordered a trial of the preliminary point, but should have allowed the plaintiff to deliver a reply. The master's order dismissing the action was set aside, and the plaintiff given leave to deliver a reply or to amend his statement of claim. The master's order for the trial of the preliminary point was also ordered to be set aside. The defendant appealed to the Court of Appeal. The plaintiff contended that this was an appeal against a final judgment, and

that, therefore, under the Judicature Act, 1935, s. 1 (f), the leave of the divisional court to appeal was necessary, which leave had been refused :—

HELD : (i) the order made by the divisional court was interlocutory, and not final, so that leave to appeal was unnecessary.

(ii) the statement of claim made it clear that all alleged causes of action arose more than 6 years before the delivery of the writ.

(iii) the refusal to allow an adjournment was a matter for the master's discretion, which should not be interfered with. A

(iv) the divisional court had no jurisdiction to deal with the master's order for the trial of the preliminary point as the appeal on this order lay to a judge in chambers.

[EDITORIAL NOTE.] The plaintiff in this case, a foreigner, was met by a plea of the Statute of Limitations and although he had many opportunities of delivering a reply, he failed to do so. From time to time he had stated that he had a complete answer to the plea by reason of absence abroad and payment on account. The Court of Appeal, however, differing from the Divisional Court decided that his failure to take proper procedural steps must bind him. The question of a master's discretion to refuse an adjournment is also fully discussed by SLESSER, L.J. B

AS TO INTERLOCUTORY AND FINAL APPEALS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 206-210, paras. 507, 508 ; and FOR CASES, see DIGEST, Vol. 30, pp. 136-139, Nos. 141-165. C

AS TO POSTPONEMENT, see HALSBURY, 1st Edn., Vol. 23, Practice, p. 176, para. 321 ; and FOR CASES, see DIGEST, Practice, pp. 556, 558, Nos. 2156-2171. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 603, 1272-1275.] D

Cases referred to :

- (1) *Jones v. S.R. Anthracite Collieries, Ltd.* (1920), 90 L.J. K.B. 1315 ; Digest, Practice, 558, 2171.
- (2) *Isaacs & Sons v. Salbstein*, [1916] 2 K.B. 139 ; 30 Digest 136, 141.
- (3) *Ruf (T. A.) & Co. v. Pauwels*, [1919] 1 K.B. 660 ; 16 Digest 178, 835.
- (4) *Laird v. Briggs* (1881), 16 Ch. D. 663 ; Digest, Practice, 805, 3673.
- (5) *Maxwell v. Keun*, [1928] 1 K.B. 645 ; Digest, Practice, 558, 2169.
- (6) *Thomas v. Gower Rural Council*, [1922] 2 K.B. 76 ; 41 Digest 47, 338.

APPEAL from an order of the divisional court, dated Nov. 4, 1936. The facts are fully set out in the judgment of SLESSER, L.J. E

Valentine Holmes for the appellant.

J. D. Casswell and *N. A. Beechman* for the respondent.

Casswell : There are two preliminary points. The order appealed against is a final order, and this appeal is therefore in the wrong list. By the Judicature Act, 1935, s. 1 (f), leave is necessary to appeal from a decision of the High Court. In this case, the divisional court refused to give leave to appeal. G

GREER, L.J. : We will reserve the preliminary points until we have heard the appeal.

Holmes : There was no appeal against the master's order for a preliminary trial, or from his refusal to grant an adjournment ; that was a matter for his discretion. It is submitted that this appeal is interlocutory ; in *Isaacs & Sons v. Salbstein* (2), it was held that the court must look at the order immediately appealed from ; if that finally H

disposes of the rights of the litigants, it is a final order ; otherwise, it is interlocutory. Here the order of the divisional court was not final, so this is an interlocutory appeal.

A The expression "a judge" in the Judicature Act, 1925, s. 1 (i), does not include a divisional court ; leave to appeal is not necessary in the case of an appeal from a divisional court : *Ruf (T. A.) & Co. v. Pauwels* (3).

B *Casswell* : The master ought not entirely to have ruled out the plaintiff, a foreigner, on his first application for extra time. Until the films were all sold, or had become stale, the venture had not come to an end, and it could not be known whether there was a loss or not. There is nothing in the statement of claim to say when the claims arose. The master had only the pleadings before him, and no information to settle the preliminary point. There was no need to appeal against the earlier
C order of the master ; it forms part of the judgment, and need not be appealed against separately : *Laird v. Briggs* (4). The Court of Appeal should be slow to interfere with the discretion of a judge to grant an adjournment ; but if the result of a refusal would be to deprive a party of his rights, and would cause an injustice, the court has power to review
D the order : *Maxwell v. Keun* (5). There is no need to anticipate the Statute of Limitations before it is pleaded. It is highly undesirable that a foreigner, coming to these courts, should be shut out, merely by a point of pleading. [Counsel referred to *Thomas v. Gower Rural Council* (6), and *Jones v. S. R. Anthracite Collieries, Ltd.* (1).]

E *Holmes*, in reply : It must have been known that the Statute of Limitations would arise. The plaintiff himself treated the pleadings as closed by taking out a summons for directions. The master was in the position of a judge, and the court will not interfere with an exercise except in "most extraordinary circumstances" : *Maxwell v. Keun* (5).

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GREER, L.J. : For reasons which will presently appear, I have asked SLESSER and SCOTT, L.JJ., to deliver their judgments before I deliver mine.

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SLESSER, L.J. : This is an appeal from a judgment of a divisional court on appeal from a master sitting as a special referee. The case arises in the following circumstances. According to a statement of claim of a Mr. Richard Kronstein, by an agreement in writing dated Jan. 13, 1923, made between one Emil Grosz and the defendant Alexander Korda,
H it was agreed that certain cinematograph films should be produced in Berlin, Germany. Grosz was to finance, and to pay expenses incurred in producing, the films, and the defendant was to direct, and manage the production of, the films. The pleader goes on to set out what he conceives to be the effect of the contract of Jan. 13, 1923, a translation

of which has been before us. He says that it was a term of the said agreement that the defendant should indemnify Grosz against loss, and, should the making of the said films result in loss, the defendant would repay to Grosz the amount of the capital invested and/or provided for the production of the said films, together with a liquidation commission A of $2\frac{1}{2}$ per cent. per month on all capital invested by the said Grosz. It is alleged that between Jan., 1923, and Feb., 1925, in pursuance of the agreement, Grosz financed the production, and paid all the expenses, of two films which were produced by the defendant in Berlin, and that, upon the completion of the films, the money provided by Grosz for the B making of the films, together with the liquidation commission of $2\frac{1}{2}$ per cent. per month, and bank interest chargeable until June 30, 1926, amounted to \$68,000 in United States currency. Grosz alleges that he has not received any sum or sums, by reason of the exploitation of the films when completed, and no part of the moneys provided by him, as C set out in paras. 3 and 4 of the statement of claim to which I have referred. In accordance with the terms of the agreement, the defendant became liable to repay Grosz the sum of money referred to in para 3 ; that is, the sum alleged to have been due on June 30, 1926. There is not, as I read the pleading, a specific allegation of the loss which is D referred to in para. 1 as the condition on which the defendant would repay to Grosz the loss which is referred to in cl. 19 of the agreement. Cl. 19 of the agreement is in the following words :

According to our agreement, you undertake the material obligation to procure that our undertaking terminate without loss and that at its liquidation I recover E all moneys under whatever head invested by me in our undertaking together with the agreement on liquidation of $2\frac{1}{2}$ per cent. the whole to be paid in dollars.

Then there follow these words :

If, nevertheless, our undertaking should result in a loss, you are irrevocably obliged to recoup to me that proportion of my capital and commission on liquidation F forthwith which shall then remain unpaid.

I read the language of the pleading to say that such a loss has occurred, and the amount which was to be paid by the defendant to Grosz on June 30, 1926, which is the last date on which it is said that the liability accrued, was the \$68,000 to which I have referred. In the final claim G under para. 1 dealing with this matter, the plaintiff claims £13,979 *2s. 10d.*, being the sterling equivalent of the United States currency at the mean rate of exchange on July 1, 1926, and interest thereon at 5 per cent. It is clear, to my mind, that the effect of this plea, and of the agreement, is to say that the right of action which Grosz obtained under this agree- H ment accrued on July 1, 1926. The plea is, to my mind, incapable of any other interpretation. Then there is, in para. 6, and also in para. 8, a further plea as to moneys being paid in 1929 by Grosz as surety for the defendant, and moneys due from the defendant to Grosz in the agree-

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ments which are said to have accrued on Dec. 31, 1929. That is said to amount to £343 4s. 5d., being the sterling equivalent of 7,000 reichsmarks at the rate of exchange on that date. In my view, it is impossible on that pleading to say that the plea does not allege a right to £343 4s. 5d. present on Dec. 31, 1929. Finally, under para. 7, it is alleged that Grosz in 1928 paid to the Wertheim Bank, Berlin, as surety for the defendant, 2,000 reichsmarks. That is reduced into English currency as £98 2s. 6d., that being the sterling equivalent of reichsmarks at the mean rate of exchange on Dec. 31, 1928, and interest thereon at 5 per cent. The statement of claim having been delivered on Mar. 19, 1936, on Apr. 14, 1936, there was delivered the defence. It is not necessary, for the purpose of the present case, to consider the defence, other than para. 6, which is as follows :

The plaintiff's alleged cause of action is barred by the Limitation Act, 1623, and the defendant will object in law that no cause of action not so barred is disclosed by the statement of claim.

That plea was not answered within the 7 days required by the rules for any reply to be delivered without leave. There was, in fact, no reply, but a summons for directions was taken out, and the pleadings were, and are for that purpose, to be treated as closed.

The next thing which has to be noted is this, that on Apr. 28, on the hearing of the summons on behalf of the defendant, the plaintiff opposing, it was ordered by MASTER BURNAND that a point of law raised by the defendant in para. 6 of his defence be set down for hearing, and disposed of forthwith, and before the trial of the issues of fact in this action. It was, of course, open to the plaintiff, apart altogether from his argument that, on the pleadings as they stood, the causes of action, or some of them, had accrued within the 6 years, and so were not barred by the Statute of Limitations, to say that, for the well recognised reasons which are an answer to a claim under the Statute of Limitations, in the circumstances of this case it did not apply. The two reasons which might have been urged, either successfully or unsuccessfully, and which were urged at a later stage in this case, were, first, that the defendant was at all material times beyond the seas, and, secondly, that certain moneys had been paid by him on account. We have had the advantage of hearing from Mr. Valentine Holmes, who appeared on the application on Apr. 28, what happened upon that date. It appears that, at that time, mention was made by counsel who was then appearing for Mr. Kronstein (not the counsel appearing for him at present) that he might consider a reply to the defence, a reply, of course, for the purpose of negating the effect of the plea of the Limitation Act, 1623, by urging that, in fact, Mr. Korda was beyond the seas at all material times, or that he had in fact paid sums upon account. Upon that application, it appears that the master did say that, if the plaintiff's advisers did desire to put in a

reply, it might well be that they would desire further time in which to do it. In fact, they did not take advantage of any such offer or possibility of an adjournment. On the contrary, all they appear to have asked for was that a certain time should elapse before the hearing of the summons, and that the summons should not be entered before May 18. A During the period between Apr. 28 and May 18, they did nothing to obtain leave to enter a reply, except that a summons was taken out after May 18 for that purpose. On May 21, the matter having been set down for hearing, the preliminary point was considered by the same learned master. It is to be observed that the learned master, though B in reality the same person, in hearing this matter was acting in a different capacity from that in which he was acting when he ordered the preliminary point of law on the summons for directions. By agreement between the parties, it was allowed that this particular master should, in the matter of dealing with the preliminary point of law, be the special referee, C and it was in his capacity as special referee that he sat, heard, and determined on May 21. It is to be observed that, acting in that capacity, he is to have, as provided by R.S.C., Ord. 36, r. 50 :

the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court. D

Therefore, acting under R.S.C., Ord. 36, as a special referee, he is to be regarded as having the same powers as if he were a judge of the High Court. In the case of a reference of that character, an appeal from the master sitting as a special referee goes, not to the judge in chambers, E as it does when he sits in his capacity in dealing with the summons for directions, but to the divisional court. Upon that application, an affidavit by Mr. Michael John Lucey, who is the managing clerk to the former solicitors for the plaintiff, was read to us. In that affidavit, the deponent says that, on May 21, at the hearing before the master, the F plaintiff's counsel not only applied for a postponement of the action, but also asked the master for leave to file a reply. Thereupon, the master refused to allow any postponement of the action, or to permit a reply to be delivered. He forthwith delivered judgment, dismissing the action with costs. Mr. Valentine Holmes tells us that his recollection differs G slightly from that of Mr. Lucey, and that what he thinks the plaintiff's counsel said was that he wished for time, not for leave to file a reply, but to consider whether he would file a reply. It does not seem to me a difference of recollection, which is very understandable after this length of time, which is in any sense material. It is clear that an adjournment H was sought, for the purpose either of putting in a reply or of considering whether a reply should be entered. The master refused that application, and dealt with the matter *rebus sic stantibus* as it was on the pleadings. On the pleadings, he did what, in my opinion, was the only

thing he could do ; that was, to come to the conclusion that the contention contained in para. 6 of the defence was well founded, and that the plaintiff's alleged cause of action was barred by the Limitation Act, 1623, in respect of the claims accruing on July 1, 1926, on Dec. 31, 1928, and on Dec. 31, 1929, because they were all out of time. On that matter being so decided, an appeal was taken to the divisional court from the judgment of the master.

There has been some discussion before us as to whether that appeal should have been properly described as an interlocutory appeal or as a final appeal. It now appears from the authorities that what we have to consider is the nature of the order made by the divisional court in coming to a conclusion whether the appeal to us is an interlocutory or a final appeal. In so far as the divisional court made an order, to which I shall have occasion to refer, allowing the case to proceed, it would seem that the order of the divisional court, which is the order which we have to consider, is an interlocutory order and must be treated as such. In the present case, it makes little difference. Mr. Casswell had this advantage, that, as a result, he was able to read certain affidavits which otherwise he might have required leave to read ; but, as those affidavits did not tell entirely in his favour, I think that the decision that this is an interlocutory order is rather a Persian gift. However that may be, the question, as to whether leave would have been given to appeal to this court had it been a final appeal, does not arise, because Mr. Holmes has satisfied me on authority that this is an interlocutory order.

The divisional court delivered a judgment. We have been given a transcript of that, which is not, we are told, entirely, but is in substance, what was said by the court. The leading judgment was given by MACNAGHTEN, J., on Nov. 4, 1936. After reciting that the present plaintiff is an assignee of Mr. Grosz, who was a party to the contract, and sues in that capacity, the learned judge goes on to say that :

An application was then made, before the time for the reply had expired, that the point raised by para. 6 of the defence should be set down for hearing, and disposed of forthwith. In view of the fact that the statement of claim did not allege when the cause of action arose, it was not a very fortunate application. The statement of claim in this particular case was at least ambiguous. If, in fact, it had made it clear when the cause of action accrued, then obviously there was no issue to try at all.

For the reasons which I have stated, the statement of claim does make it clear when the cause of action arose, or, at any rate, makes it clear that the cause of action arose more than 6 years before the action was brought and makes it clear that the Statute of Limitations, be there no other answer to it, does apply. To that extent, I regretfully find myself in disagreement with the learned judge. Then comes this question : Was the master wrong in refusing the adjournment on May 21 ? With regard to that, it would appear to me that, in the first place, that was

a question for his discretion. As is provided under R.S.C., Ord. 36, r. 34 :

The judge [and, as I have said, the special referee is here to be treated as if he were a judge] may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit.

I think primarily this matter was one for the master's discretion. The matter has been considered in several cases in this court, but perhaps the most useful case for this purpose is the case of *Jones v. S.R. Anthracite Collieries, Ltd.* (1). That case was a case dealing with an adjournment asked for during an application, and was not a case of discretion in fixing a particular day and insisting upon a case being heard at a particular time. The county court judge was there sitting as an arbitrator under the Workmen's Compensation Act. He, as it was argued, in his discretion, refused, without giving a reason, to grant an adjournment for the production of certain evidence. The facts were these, so far as they are relevant here. The applicant met with an accident, and liability was admitted by the respondents, who paid him full compensation. He then returned to light work, receiving larger wages than his old wages by reason of war bonuses. The applicant took proceedings, claiming for partial incapacity. The respondents contended that it ought to be taken into account that, with the war bonuses and other additions, his present earnings were larger than his old earnings. The applicant contended that they should be excluded in calculating his earnings after the accident. The applicant *subpœnaed* the manager of the respondents' colliery to produce certain documents. When the manager was called, he did not produce the documents, saying that they were not in his possession. The applicant's counsel applied for an adjournment, in order that the instructions, which had relation to the methods of payment of wages under the Sankey award, and which were not in the possession of the head office, should be produced. The county court judge, without assigning any reason, refused to grant an adjournment. When the matter came before the Court of Appeal, LORD STERNDALE, M.R., having pointed out that these considerations, which it was sought to adduce, were or might have been relevant to the question which the county court judge had to decide, said, at pp. 1316, 1317 :

I should have said *prima facie* that that adjournment which was asked for ought to have been granted, because it certainly was a surprise to the applicant that, this *subpœna* having been served upon a responsible person—the manager of the respondents' collieries—he had not received any intimation that the manager was the wrong person to *subpœna*. I do not say there was any legal obligation upon the manager to give that intimation, but it would have been a reasonable and a proper thing to do, if he intended, when the trial came on, some months after he had received the *subpœna*, to say that he was not the proper person to produce these documents. It was, therefore, a surprise to the applicant, and I think the right thing to have done would have been for the learned county court judge to have granted the adjournment asked for and to have told the manager : “ If that is the

point you are going to take, you ought to have told the other side of it long ago, so that they could have *subpoenaed* the right person." If the learned judge had refused to grant the adjournment, upon grounds which showed that he had considered these matters, but that he had come to the conclusion, in spite of them, that he thought the applicant's conduct, or that of his advisers, had been such as to make it unreasonable for him to grant an adjournment, then we should not have interfered. But no reason appears at all as to why he did it.

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- In the present case, there is no suggestion that, on this summons to determine this preliminary point, there was anything in the nature of a surprise on the part of anybody. The question that had to be considered had been first of all raised in the pleadings themselves; that is
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- to say, as early as Apr. 14, 1936, more than a month before the hearing of the preliminary point of law, the defendant had taken the point that the Statute of Limitations applied to this case. That is benevolently to assume that the plaintiff himself did not know that from his own pleading. At any rate, by Apr. 14 it was brought to his notice. Secondly,
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- we have to consider this fact, that, as Mr. Holmes has told us, and it is not disputed, this question was raised on the summons for an order for a preliminary point of law to be considered when that matter was before the master. Then, it was intimated that an adjournment might be considered if the plaintiff found himself in a position to urge that the
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- Statute of Limitations would not apply, because Mr. Korda was beyond the seas. That was all open and before the parties on the application for the preliminary point of law to be argued. But the plaintiff did nothing; he did not ask for leave to put in a reply; he did not ask that the preliminary point of law should be adjourned, and took the point
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- asking for an adjournment only when he found himself before the master on May 21. There is no question in this case of anybody being taken by surprise. In my view, it is a case where the special referee must be taken to have come to the conclusion that he thought that the applicant's conduct, or that of his advisers, had been such as to make it unreasonable for him to grant an adjournment. The circumstance in which
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- LORD STERNDALE, M.R., says, in *Jones v. S.R. Anthracite Collieries, Ltd.* (1), that he would not in that case have interfered with the decision of the learned county court judge does not apply. My view is fortified by the fact that, on the occasion when the adjournment was sought, there were
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- put before the learned special referee certain letters which we have not seen; apparently they are not now in the possession of either party. Though Mr. Holmes was not allowed to see them, he expressed himself ready that the learned special referee should consider them. Those letters, which we must assume to be relevant, gave reasons, I suppose,
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- why it was thought that an adjournment should be granted. At any rate, they were before the learned special referee, and he read them and considered them.

The next point is this: Can it be said that, where the refusal of an adjournment of a case might produce to one party a situation in which

he would find himself unable to have his rights properly litigated, although the time for asking for a reply had gone by, in this sense, that the 7 days had expired and he would have to ask for leave, there is any principle, beyond that indicated by LORD STERNDALÉ, M.R., in the passage to which I have referred, on which the court could interfere with the master's discretion? In my opinion, there is none. In that same case, the case of *Jones v. S.R. Anthracite Collieries, Ltd.* (1), SCRUTTON, L.J., says, at p. 1317 :

My impression is that this court has frequently interfered with the decisions of county court and High Court judges in regard to the question of "adjournment," because the whole duty of this court, and of every court, should be to do justice between the parties without being prevented by technical objections.

In my opinion, the objection to interfering with the special referee's decision in this case goes far beyond any technical objection. It is a case where every reasonable opportunity, as it seems to me, was given to the plaintiff to put right any deficiency in his procedural machine. He knew the position in May. He failed to appeal from the order of the learned master, ordering the special question of law as to the Statute of Limitations to be considered. That in itself shows an acceptance of the situation that the pleadings as they stood should be considered with reference to the Statute of Limitations. He went further than that. He only made a request that the summons should not be set down until May 18, and accepted the position, by his own conduct, that the argument should take place upon the pleadings as they were, that is to say, without adding any reply raising questions as to the defendant being beyond the seas, or having paid money on account. That was his own conduct; so that the preliminary question on the existing pleadings stood. When the matter again came before the learned master, the plaintiff and his advisers were not even then prepared with any evidence of a cogent kind, they merely produced certain letters; it is only here that affidavits supporting their view have been before the court. I think I am right in saying that there were no other affidavits read in the court below; they were there, but they were not read. They were not before the master. He had nothing except these letters, the contents of which we do not know. If the plaintiff, through the laches of his advisers or his own incapacity, has failed to put his case properly before the court, when he has had many opportunities to do so, I think it would be a very bad example if he should once more be allowed to re-open the matter. It is true that the plaintiff is a foreigner. We were told that until recently the defendant was also a foreigner. However that may be, the defendant has rights as well as the plaintiff. The distinction is clearly drawn, by LORD STERNDALÉ, M.R., between the case where justice requires that a plaintiff shall be allowed to put his case before the court, and the case where his own conduct has excluded him from taking advantage of a principle which might otherwise prevail.

The next matter is this. The divisional court, when the matter came before them, took upon themselves to deal not only with the question of the refusal of the adjournment in May, but also with the question of the order for the preliminary trial in April. Their order
A extends to both matters. I have already given the reasons why I think the divisional court were wrong in coming to the conclusion that the second order of May 21 should be set aside. As to the earlier order dealing with the preliminary matter, in my opinion they had no jurisdiction to make such order. There was, in fact, no appeal taken from
B that order, but, had it been taken, as it was an appeal from a master, it would have had to be heard by a judge in chambers and not by the divisional court. The case which was cited to us was a decision of LORD READING, and it does not seem to me to deal with this point, for this reason, that, in the case which was referred to, the same tribunal
C was competent to deal with both orders, and, for convenience and to avoid circuitry, it did deal with both orders. In my view, there is a fatal objection in the present case to the divisional court dealing with the first order. That objection is that they have no jurisdiction to deal with it, because no appeal could lie from the decision of the master to
D the divisional court.

The order of the divisional court will be set aside, and the appeal will be allowed.

SCOTT, L.J. : I agree with the judgment of SLESSER, L.J., and do
E not feel it necessary to deliver a separate judgment.

GREER, L.J. : After very serious consideration, and with the gravest possible doubts, I find myself able, subject to those doubts, to concur in the decision which has been given by my brethren allowing this appeal
F restoring the decision of the master.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors : *Allen & Overy* (for the appellant) ; *Douglas Grant & Dold* (for the respondent).

Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.

Re SANDEMAN'S WILL TRUSTS, SANDEMAN v. HAYNE.[CHANCERY DIVISION (Clouston, J.), **January 11, 1937.**]*Trusts and Trustees—Duties of trustees—Beneficiary absolutely entitled—Transfer of trust estate.*

In the events which had happened, a testator's residuary estate was held as to one half in trust for the plaintiffs absolutely and as to the other half in trust for the testator's daughter for life and subject thereto for her children absolutely. The trust fund comprised, *inter alia*, certain shares in a private limited company, which shares carried a voting power in the company sufficient to enable the holder of them to control an ordinary resolution. By his will the testator had directed the trustees not to sell these shares "unless they in their discretion shall consider it absolutely necessary," and he authorised them "to retain the same so long as they in their absolute and uncontrolled discretion shall think fit." The plaintiffs required the trustees to divide the estate and to transfer to them the half to which they were entitled. The trustees contended that they were entitled to refuse to divide the shares if in their discretion they were of opinion that it was to the interest of the trust fund as a whole that they should be retained :—

HELD : the plaintiffs were entitled to have their half of the estate, including half of the shares in question, transferred to them.

[EDITORIAL NOTE.] The usual incidents of shares in private companies are well known and in the present case the testator had authorised the trustees to retain them as long as they should think fit. This did not prevent beneficiaries, who had become absolutely entitled to one half of such shares, calling for a transfer from the trustees.

AS TO TRANSFER OF TRUST PROPERTY ON TERMINATION OF TRUST, see HALSBURY, 1st Edn., Vol. 28, Trusts, p. 115, para. 252; and FOR CASES, see DIGEST, Vol. 43, p. 758, Nos. 2011-2015.]

Case referred to :

(1) *Re Marshall, Marshall v. Marshall*, [1914] 1 Ch. 192; 43 Digest 868, 3128

ADJOURNED SUMMONS taken out by two of the beneficiaries under the will, dated Dec. 9, 1904, of John Glas Sandeman, asking (i) that the trustees of the said will might be directed to pay off the sum of £7,700 or other the principal moneys due and owing upon a certain heritable bond in favour of the trustees of the defendant Hordern's marriage settlement and secured on Nos. 53 to 57, Miller Street, Glasgow, and all interest thereon, and for that purpose to raise the necessary moneys out of the testator's residuary estate; (ii) that, subject to provision for the payment off of the said principal moneys and interest, the defendant trustees might be directed to pay and transfer to the plaintiffs their moiety of the testator's residuary personal estate.

The testator died in 1911, and by his will he bequeathed his residuary estate to the trustees therein named in trust to pay the annual income of one moiety to his son Eric David Glas Sandeman, and of the other moiety to his daughter Edith Augusta Hordern, for life, and after their deaths as to each moiety in trust for their children on attaining the age of 21 or being daughters marrying under that age in such shares as the

- life tenants should appoint, and, failing appointment, in equal shares. The testator's son, Eric David Glas Sandeman, died on Dec. 3, 1935, without having exercised his power of appointment over his moiety, and left him surviving two sons, the plaintiffs in the present proceedings,
- A both of whom had attained the age of 21 years. On Dec. 3, 1935, the testator's residuary estate, in addition to the property at Glasgow above-mentioned, was represented mainly by 3,167 preferred ordinary shares and 702 ordinary shares in D. Sandeman & Son and J. Calrow & Son, Ltd., and certain other investments.
- B The testator's will also contained a provision in the following terms with respect to the said shares :

- And I further direct my trustees not to sell any of my preferred ordinary or ordinary shares in my business of David Sandeman & Son and J. Calrow & Son, Ltd., in London, and David Sandeman & Son, Ltd., in Glasgow, unless they in their discretion shall consider it absolutely necessary and I authorise them to retain
- C the same so long as they in their absolute and uncontrolled discretion shall think fit without being in any way held answerable or responsible for any loss which may accrue to my estate thereby and to treat the dividends arising therefrom as income of my estate and to deal with the same accordingly.

- The trustees of the will contended that they were justified in refusing to transfer to the plaintiffs the shares in the above-named company to
- D which they had become absolutely entitled on the death of their father, Eric David Glas Sandeman, if they, the trustees, in the exercise of their discretion, were of opinion that it was to the interest of the trust fund as a whole that they should be retained. As appears from the judgment, the said shares carried a voting power in the company sufficient to enable
- E the holder of them to control an ordinary, though not a special, resolution, and the trustees were of opinion that, in view of the position of the company, it was to the benefit of the trust fund that, for the time being, that voting power should be kept intact. As arrangements had been made by the trustees, before the hearing of the present proceedings, for
- F payment off of the mortgage mentioned in the first question in the summons, no argument was addressed to his Lordship on that question.

- M. J. L. Beebe*, for the plaintiffs, the two sons of the testator's deceased son, Eric David Glas Sandeman : See *Re Marshall, Marshall v. Marshall* (1), where the beneficiaries, in circumstances similar to those in the
- G present case, were successful in their application. The company in *Re Marshall* (1) was not a private company, and to that extent that case is not *in pari materia* with the present case. In this case, also, there is no trust for sale, the direction being not to sell but to retain the shares, and, that being so, there is nothing that the trustees can do but to hand
- H over the shares to the plaintiffs, who are absolutely entitled to them by the death of their father.

CLAUSON, J. : The question has nothing to do with sale. I can understand the case where a transfer of shares may be postponed because at the moment it might cause difficulties in administration, but I cannot

appreciate that the power to postpone justifies the trustees in refusing to allow people to have their own property.

J. V. Nesbitt, for the first three defendants, the present trustees of the testator's will : The trustees are of opinion that, owing to the present circumstances of the company, it is for the benefit of all the beneficiaries that they should retain control of these shares, and they make out a sufficient case in their affidavits that, for a certain time, until it can be seen how the affairs of the company are going, it is essential that they should control the voting power. In the special circumstances of the case, which were absent in *Re Marshall* (1), but to which the learned Lords Justices referred, and whose absence caused them to come to the decision they did come to in that case, the trustees are entitled to refuse the plaintiffs' request. In this will, there is an express direction to retain, and, later on, another direction that the trustees are not to sell any of these shares, unless they consider that it is absolutely necessary. From the point of view of preserving the trust, transferring a share to a beneficiary is the same thing as selling it to someone else. Reading this will as a whole, the intention of the testator clearly was that the trustees should retain the whole of these shares until they all fell into possession.

Wilfrid M. Hunt, for the last defendant, the testator's daughter : I am in the same interest as the trustees of the will. In a case such as this, the plaintiffs are entitled to a half share in a residuary estate comprising various items, not to a half share of each item.

CLAUSON, J. : How is the interest of the whole greater than the interest of two parts ?

Hunt : The interests of the shareholders, *qua* shareholders, might be quite different from those of shareholders employed in the company.

CLAUSON, J. : No such question has arisen, and there is nothing here to lead me to suppose that any such question will arise, though I can conceive that it might.

Hunt : The fact that, in the last three or four years, the profits of the company have not amounted to as much as the dividends paid, shows that the position of the company at the moment is critical, and that it is important, in the interests of all the beneficiaries, that the trustees during the next few years should be able to control it. There is a power in this will to retain these shares even as against a beneficiary absolutely entitled during the period of the trust.

CLAUSON, J. : Under the will of Mr. John Glas Sandeman, the residuary estate is now held in this way. In the events which have happened, one half belongs to the plaintiffs in the present proceedings, Mr. Ernald Sandeman and Mr. Vivian Sandeman. The other half is held upon trust for Mrs. Hordern for life, and, subject to her life interest,

for certain children of hers who, I gather, are absolutely entitled. I imagine that lady is of such an age that we may assume that there will be no more children, though it does not really matter. The substance of the matter is that her half of the estate belongs to her for life, and, A subject to her life interest, belongs to her children, who are now of age.

The estate at the present moment consists, first of all, of a property in Glasgow, which is subject to a mortgage, and, secondly, of ordinary investments of more or less a trust character, and, thirdly, of a considerable block of shares in a company which, originally a public company, B had, by the time the testator died, been turned into a private company. The block of shares consists of the majority of the preferred ordinary shares, which carry one vote for every ten of the shares, and slightly less than half of the ordinary shares, which carry one vote each. Taking the actual voting power, the shares comprised in the estate carry 1,018 C votes out of 1,927. Accordingly, as the holdings now stand, those holding the estate shares could pass an ordinary resolution, though they could not necessarily pass a special resolution. I think that is the way it works out.

The plaintiffs, as I have said, are absolutely entitled to half the estate. D The difficulty in dividing the estate arises, in the first instance, from the fact that there was this mortgage existing over the Glasgow property. But that difficulty in the way of distribution has disappeared, because the trustees, as I am told, are taking steps to pay off that mortgage. When that mortgage has been paid off—though that will, of course, E reduce to some extent the amount of the investments, because, I suppose, money will have to be raised out of these investments to pay off the mortgage—the difficulty occasioned by the existence of the liability on the mortgage will vanish. The estate will then consist of certain general investments, and, among them, the investments in the shares of this F particular company. As a matter of fact, in the division of the estate certain sums have to be brought into hotchpot. The net result of it is that, for practical purposes, it may be treated that the investments which will be left after the mortgage has been paid off will correspond fairly nearly to the amount which has to be brought into hotchpot on G behalf of the share which is now settled. Accordingly, there is no practical difficulty, as the matter now stands, in dividing up the estate. There is no difficulty in dividing the preferred ordinary and the preferred shares into two halves, leaving one half in the hands of the trustees upon trust for Mrs. Hordern and her family, the other half of the shares H going to the plaintiffs, who are absolutely entitled to it. In those circumstances, it is settled law that, *prima facie*, the plaintiffs are entitled to have those shares transferred to them. *Prima facie*, that is so. But the court will not order that transfer to be made if there is some good ground to the contrary.

The court has, I think, been rather careful never to define in precise terms exactly what would be good ground to the contrary. All I have to do in this case is to ascertain whether, on the facts now before me, there is some good ground for ignoring the plaintiffs' *prima facie* right to have half of the shares transferred to them. A

In the will, there is a provision that the trustees are not to sell the shares in this particular company unless, in their discretion, they think it desirable so to do ; and they are to be at liberty to retain the shares as an investment. It is suggested—at least, I think it is suggested—that I can spell out of that power in the will an express direction to the trustees, or at all events a power in them, to refuse to transfer part of the trust property to a beneficiary who is absolutely entitled to that part of the trust property, provided that the part of the trust property in question is the shares in this particular company. That does not seem to me to be the true construction of the will. The clause to which I have been referred seems to me to deal with the question of the sale of the shares. Although it has been suggested by counsel that the transfer of shares to a beneficiary in some sense is equivalent to a sale, because it parts those shares from the estate, I do not take the view that it need be a sale at all. It is a recognition, on the part of the trustees, of the title of a man to something which belongs to him. In my view, on the construction of this will, the clauses contained in it, to which my attention has been drawn, have no bearing upon the problem which I have to consider. However, that is a question of construction ; and it may be that my view is not quite right as regards that. So I will confine myself now to considering whether there is anything, either in the will or in the circumstances, which justifies me in refusing to allow effect to be given to what the Court of Appeal, in *Re Marshall* (1), has determined in these circumstances to be the *prima facie* right of the plaintiffs, namely, to have the shares which belong to them transferred to them. B C D E F

It is suggested that I am entitled to ignore that right for this reason. It is said that, if these shares are left in the hands of the trustees, the effect of that will be that the trustees can have control of the company, as against the holders of the remaining shares, in connection with any resolution which they may think desirable to have passed at a general meeting. That is perfectly true ; but it is to be remembered that the trustees can do that only having regard to the interests of their beneficiaries. If you have two sets of beneficiaries equally concerned in the trust, and those two sets of beneficiaries take differing views as to the course which the trustees ought to take, the court will certainly see that those trustees, before exercising their power of voting, pay due regard to the wishes of those two sets of beneficiaries. It is foolish to say that the trustees, having shares in their name, have G H

anything in the nature of an independent right to deal with voting power of the shares. However that may be, there is no fact, at the present moment, which seems to show that the interests of anybody concerned in the trust will be in the slightest degree prejudiced by the proper division being made—in other words, by the shares to which the plaintiffs are entitled being handed over to them.

I can conceive that there might be circumstances—they would have to be very special—which would justify the court in refusing to give effect to the plaintiffs' rights ; but I cannot find, on the evidence before me, anything to suggest that such circumstances exist in this case. I have no reason to suppose that either the trustees, on the one hand, or the plaintiffs, when they become transferees of their shares, on the other hand, will exercise their voting power otherwise than perfectly *bona fide* ; and I cannot see that any harm will be done to anybody by giving effect to the *prima facie* right of the plaintiffs to have their shares, and the voting power on their shares, in their own control.

If that is the right view on the facts, whether my view of the construction of the will is right or not, it is quite plain that the plaintiffs' rights must be given effect to ; and they must have their half of the shares in question transferred to them. In my view, that is the order, and the only order which I can make. The form of the order will be as follows :

It appearing that the defendant trustees are taking steps to pay off the Miller Street mortgage that the defendant trustees subject to such mortgage being paid off or provision made for the payment thereof pay and transfer to the two plaintiffs their moiety of the testator's residuary personal estate including their moiety of the 3167 preferred ordinary and 702 ordinary shares in D. Sandeman & Son and J. Calrow & Son, Ltd.

Costs of all parties as between solicitor and client out of the funds subject to the trusts of the testator's will. Liberty to apply.

Solicitors : *Pickering, Kenyon & Co.* (for the plaintiffs) ; *Boulton, Sons & Sandeman* (for all the defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

BURGESS otherwise LEADBETTER v. BURGESS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **December 14, 1936.**]*Divorce—Nullity—Wife's petition—Incapacity of husband—Children born in wedlock—Wife's evidence as to paternity—Admissibility.* A

In a suit for nullity on the grounds of her husband's incapacity, a wife petitioner sought to give evidence that the marriage had never been consummated and that a man other than her husband was the father of a child born to her during wedlock :—

HELD : the evidence was admissible. B

[EDITORIAL NOTE. The rule in *Russell v. Russell* (2) is again considered in this case. The point here is different from that in *Farnham v. Farnham otherwise Daniels* (1). There the husband was the petitioner and he desired to prove that the child which had been born to his wife was not his. Here the wife is the petitioner and desires to prove that the father of her child is not her husband.

AS TO THE RULE IN *Russell v. Russell*, see HALSBURY, Hailsham Edn., Vol. 2, pp. 562, 563, para. 772 ; and FOR CASES, see DIGEST, Vol. 3, pp. 364-368, Nos. 54-97.] C

Cases referred to :

(1) *Farnham v. Farnham otherwise Daniels*, [1936] 3 All E.R. 776 ; Digest Supp.

(2) *Russell v. Russell*, [1924] A.C. 687 ; Digest Supp. D

PETITION for nullity by a wife, on the ground of her husband's incapacity. The petition was not defended.

On behalf of the wife petitioner, evidence was tendered that during the period of cohabitation she had given birth to two children, of whom she alleged the husband respondent was not the father, he in fact being impotent. E

John Latey, for the petitioner : The wife's evidence regarding the paternity of her children is admissible : see *Farnham v. Farnham otherwise Daniels* (1). The *ratio decidendi* in that case was that the decision in *Russell v. Russell* (2) was arrived at with the intention of not prejudicing the rights of parties to nullity suits. F

BUCKNILL, J. : This is a rather unusual case. It is a petition by a woman for a decree of nullity on the ground of the incapacity of her husband. The husband has not appeared to the petition. The parties were married in Aug., 1928, and, according to the evidence of the petitioner, who gave her evidence very well and, I think, truthfully, she was at that time pregnant by another man. The other man was unwilling or unable to marry her, and she said that she told her future husband of her condition and who the father was, and that he was quite prepared to marry her and to treat the child as his child. The parties went through a form of marriage, but the evidence of the petitioner was that the marriage was never consummated, owing to the incapacity of the husband. They lived together for some months, then he left his H

wife for about 3 years. Then he asked her to come back. She went back and they lived together again for 8 months. The same thing happened; he was unable to consummate the marriage, owing to his impotent condition; she was willing, but he was incapable. Then
A they parted again, and from Apr., 1935, they lived together again until Oct., 1935. The same thing happened again; he was incapable; and on this occasion the petitioner got a doctor, who was called as a witness, to examine the husband. The doctor says he came to the conclusion that the husband was sterile and was slightly malformed. In Oct., 1935,
B the petitioner left her husband. On Aug. 6, 1936, she gave birth to a child. The petitioner has given an explanation as to the birth of that child, which is that another man was the father. The question that I have to decide is whether that evidence is admissible. Mr. Latey, who has put the case very clearly before me, has argued that this evidence
C of the wife as to the parentage of the second child is admissible under the decision of LANGTON, J., in the case of *Farnham v. Farnham* (1). The facts in that case were rather different from this case, because in that case it was the husband who was petitioning for the annulment of his marriage and the difficulty which he had to get over was that his wife
D had given birth to a child. It was argued there, or suggested there, that to give evidence of non-consummation between husband and wife would tend to bastardise that child. I cannot myself see any reason in principle why the arguments which LANGTON, J., followed in that case should not apply in this case. It may seem not such a hardship on the
E wife in this case to exclude the evidence, as it would have been in the case of *Farnham v. Farnham* (1), because in this case it is she herself who has given birth to a child, although the circumstances in which it was conceived were not altogether to her credit. In the circumstances, I think I ought to admit the evidence. I accept it, and I find that her
F husband was at all times incapable of consummating the marriage and that the marriage never was in fact consummated, and there will be a decree of nullity pronounced in the suit.

Solicitors: *Wood, Nash & Co.*, agents for *Sheppard & Son*, Battle (for the petitioner).

G [Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

CHASTENEY *v.* MICHAEL NAIRN & CO., LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 14, 1937.]

Factories and Shops—Dangerous machinery—Fencing—Unfenced pinion-wheels—Injury to workman—Factory and Workshop Act, 1901 (c. 22), s. 10 (1) (c). A

The respondents were charged with having failed to have the pinion-wheels of parts of their machinery securely fenced so as to be safe to every person employed or working in their factory, in consequence of which one of their workmen was injured while engaged in greasing the machinery while it was in motion. The respondents had put up a notice in the factory as follows: "Do not put your hands in the machinery while it is in motion. Persons disregard this notice at their own risk." The pinion-wheels, although usually stopped, were occasionally allowed to remain in motion, for the purpose of greasing. The magistrate dismissed the charge, holding that the pinion-wheels were not dangerous parts of the machine unless in motion, when it was not usual for greasing to be done:— B

HELD: as the wheels were dangerous parts of the machinery, they ought to have been securely fenced, despite the fact that greasing was not usually done while the machinery was in motion, as it cannot be assumed that every person will always exercise the necessary care. The offence charged was therefore proved. C

 **EDITORIAL NOTE.** The question here litigated was very carefully considered in a civil action for damages by DU PARCQ, J., in the recent case of *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170. The present case is a prosecution for failing to observe the provisions of the Act, but it will be seen that the definition of a dangerous part of a machine is much the same in each case. It is not to be assumed that everyone will be always careful and the machine must be safe in all circumstances that can reasonably occur, including disobedience of servants to explicit instructions. D

AS TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.] E

Case referred to: F

(1) *Sowler v. Steel Barrel Co., Ltd.* (1935), 33 L.G.R. 376; Digest Supp.

APPEAL by way of case stated from a decision of the stipendiary magistrate sitting at the Greenwich police court. The facts and the arguments are set out in the judgments. G

Valentine Holmes for the appellants.

C. J. Conway, K.C., and *D. E. Evans* for the respondents.

LORD HEWART, L.C.J.: This is a case stated by the learned stipendiary magistrate sitting at the Greenwich police court. It arises out of a prosecution of the present respondents for failing to observe the provisions of the Factory and Workshop Act, 1901, s. 10 (1) (c), that certain parts of machinery, namely, the pinion-wheels of a certain mixer, were not securely fenced, or in such position or of such construction as to be H

equally safe to every person employed or working in the factory, as they would be if they were securely fenced. It was further alleged that, in consequence of that neglect, a certain workman was injured. The learned magistrate, who has evidently taken great pains about the statement of this case, having heard the evidence, came to the conclusion that the charge had not been made out. The question for us is whether, upon the facts, he came to a correct conclusion on the point of law. The working of this machine has been carefully explained to the court by Mr. Valentine Holmes, with the help of the photographs and the very useful moving diagram. It is not necessary to enter upon an examination of it in detail, but it appears that in the drum of this mixing-machine were a number of revolving knives, driven by means of four cog-wheels, which were called pinion-wheels. Those pinion-wheels needed to be lubricated from time to time. The method of lubrication was by means of four grease-cap lubricators, called Stauffer caps, projecting at the side of, and to the rear of, each of the pinion-wheels. The actual method of lubricating was to screw down those grease-caps from time to time, and so to force the lubricating material on to the shafts of the pinions. Those pinions were $14\frac{1}{2}$ ins. in diameter, and, when the machine was working, the rotation was at the rate of 12 to 14 revolutions a minute. The construction of the machine in that part of it was such that the clearance between the two lower pinion-wheels and the inside rim of the large cog-wheel was no more than $\frac{1}{8}$ in. The case says this :

Save for a double rail fence 3 ft. 2 ins. high, running parallel to the large cog-wheel, and supported at the end nearest to the said cog-wheel by a vertical stanchion and an adjacent guard for a belt and pulley, there is no fencing in or near the said pinions.

The case further finds that :

When the drum is tilted and/or rotated, the said pinions and the said nip become readily accessible to a person standing by the said stanchion but outside the said fencing, and the said pinions, if in motion, were dangerous to any person attempting to grease them.

Even when the drum was in course of being emptied, after the process of mixing had been completed, the case finds that the knives and pinion-wheels were generally kept in motion, in order to assist the process of emptying. The case further finds that a certain cross-rail, shown in one of the photographs, and a certain wire grating, also shown, had not been erected at the time that the alleged offence was committed. Moreover, the case finds that the respondents instructed their employees that the machine must be stopped for the purpose of greasing, and that when the machine is being greased the pinions are generally stopped, although occasionally they are allowed to remain in motion. More than that, the respondents had put up a notice : "Do not put your hands in the machinery while it is in motion. Persons disregard this notice at their own risk."

Now, what happened ? On a day in Feb., 1936, a greaser employed by the respondents was engaged in greasing the machine by screwing down the grease-cap lubricators. The machine was, at the time, being tilted for the purpose of emptying. The man was standing, with his left hand on the stanchion, and outside such fencing as there was, and, as he was drawing away his right hand, after screwing down one of the lubricators, the hand was caught in the nip between one of the said pinion-wheels and the inside rim of the large cog-wheel, and such injuries were sustained that the hand had to be amputated. The case goes on :

There was no fencing or other protection to prevent the said Peerless' hand being so caught. The said pinion-wheel, when in motion and in this position, was dangerous to any person putting their hand thereon.

Those being the material facts, the learned magistrate has thought it right to form this opinion, that, although the said pinion-wheels were undoubtedly dangerous to workmen greasing the same, unless stopped, there was no reason to suppose that a workman would grease the said wheels when in motion, and that in no other circumstances could the machine be considered dangerous, and, therefore, notwithstanding the facts found, he came to the conclusion that the pinion-wheels were not dangerous parts of the machinery. I have every desire to be fair to the learned magistrate, who evidently took considerable trouble in this matter, but I find it exceedingly difficult to reconcile the opinion which he formed with the facts which he found. It really comes to this, that this particular part of the machinery was dangerous, as indeed the diagrams and the photographs make perfectly clear, unless a man refrained from putting his hand in to grease at the time when the machinery was in motion. But that was an event which might well occur. I cannot accept the suggestion—it is no more than a suggestion—that this has never happened before. On the contrary. It is found that the pinions were generally stopped for the purpose of greasing, but occasionally were allowed to remain in motion. In other words, it is precisely one of those cases where a workman, to save himself time or trouble, and to prevent waiting, as he might have waited, for a moment of safety, put his hand in, not in order to do something capricious, or to do something which would justify a critic using the word “lunatic,” but in order to do the thing which he was employed to do, namely, to grease. He was doing the thing he was employed to do, but he was not doing it at an appropriate moment. In my opinion, that is the very sort of thing which this section of the Factory Acts was designed to meet. Sect. 10 says that all dangerous parts of the machinery must either be securely fenced, or be in such position, or of such construction, as to be equally safe to every person employed or working in the factory, as it would be if it were securely fenced. It seems to me impossible to contend, on the facts of this case, that this part of this machinery was securely fenced.

As was said, for example, by no means for the first time, nor for the twentieth time, I should think, in the case of *Sowter v. Steel Barrel Co., Ltd.* (1):

A "Safe" means "actually safe," and this actual safety is to be procured (a) by secure fencing, or (b) by safe position, or (c) by safe construction.

Again, quoting one more sentence from that case:

It is to be observed that the words are "securely fenced," and not "somewhat securely fenced."

B A little later the word employed is "'safe' not 'moderately safe'." The argument really comes to this, that, if the greasing were done at a time when this machine was in motion and tilted, there was danger, but it was not likely that this greasing would be done at such a time. Now, if this contention were to prevail, it would involve re-writing sect. 10 of the Factory and Workshop Act. It would mean that it was enough that the machine was safe if everything was done that ought to be done, and if workmen obeyed all the instructions which were given to them. Experience has shown that, for various reasons, that state of industrial perfection does not exist, and, therefore, it is necessary that actually secure fencing should be insisted upon. In my opinion, it was not open to the learned magistrate, on the facts of this case, to arrive at the conclusion that these wheels were not dangerous parts of the machine. They seem to me, if I may say so with all respect, to be typical examples of dangerous parts of machinery, and ought to have been securely fenced, notwithstanding that a reasonable employer, bringing his mind to bear upon the probabilities, thought that such an act as was done in this case was not likely to be often done, and not likely to be habitually done. I think that this appeal ought to succeed, and the case ought to go back to the learned magistrate with the direction that the offence which is charged is proved.

SWIFT, J. : I agree, and I wish to make only one observation about this machine. I am quite satisfied on the evidence before the learned magistrate, and on the learned magistrate's own finding of fact, that this was a dangerous part of the machinery, which ought to have been securely fenced. The only observation which I wish to make about the matter is this. Photographs have been put before this court, as they were before the learned magistrate, showing a cross-rail in the foreground, and a wire grating on the left. Neither the cross-rail nor the wire grating was affixed at the time of the accident. The observation which I wish to make about it is this: do not let it be thought by anybody, because those photographs with the cross-rail and the wire grating have been produced before this court, that the machine now gets a certificate as being securely fenced, because I am very far from thinking

that, with this cross-rail, sect. 10 of the Act of 1901 has been complied with, so far as this most dangerous machine is concerned.

GODDARD, J. : I agree, and I have nothing to add.

Appeal allowed with costs, and case remitted back to the magistrate with direction that the offence charged was proved. A

Solicitors : *Treasury Solicitor* (for the appellant) ; *L. Bingham & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., *Barrister-at-Law.*] B

MUTUAL LOAN FUND ASSOCIATION, LTD. v. SANDERSON.

[KING'S BENCH DIVISION (Porter, J.), **December 18, 1936.**]

Moneylending—Memorandum—Actual rate stated—Instalments—Allocation to principal and interest—Interest upon interest—Moneylenders Act, 1927 (c. 21), ss. 6 (2), 7, 15 (2). C

A borrower was in debt to a moneylender in the sum of £301 19s. 10d. On June 14, 1935, he received a further sum that made his total indebtedness £500. The memorandum stated that the principal sum was to be applied in discharge of the previous advance. It also stated that the interest upon the sum of £500 was to be £200, and was at the rate of 34.65 per cent. per annum. The repayment was to be made in equal instalments, which were appropriated to principal and interest in proportions other than that of the principal to the total interest. If an instalment was more than seven days overdue, the whole balance of the principal was then to become due with interest to date. The memorandum then stated : "the principal sum outstanding in the schedule of repayments shall become immediately repayable, together with the instalment of interest due as shown in the schedule aforesaid, together with simple interest at the rate per cent. per annum aforesaid on the sum payable (whether for principal or interest) until payment, and such interest shall not be reckoned as part of the interest charged in respect of the loan." In accordance with this clause the plaintiffs took the amount of principal and interest due at the date of default, namely, £451 2s. 10d., and charged interest thereon until the date of the first payment on account. Such interest amounted to £173 0s. 5d. The payment then made of £169 9s. 7d. was appropriated to interest, leaving the principal sum of £451 2s. 10d. still due and a balance of £3 10s. 10d. of interest still due. Further interest was afterwards charged on the principal sum of £451 2s. 10d. :— D E F G

HELD : (i) the loan was one at an actual rate of interest, and the provisions of the Moneylenders Act, 1927, s. 15 (2), which required instalments to be allocated to principal and interest in the proportion of the principal to the total interest, did not apply.

(ii) the memorandum sufficiently showed that nature of the transaction in respect of the past loan.

(iii) the appropriation of payments after default to interest did not amount to a charge of interest upon interest contrary to the Moneylenders Act, 1927, s. 7. H

[EDITORIAL NOTE. This case is concerned with the working out in practice of certain of the provisions of the Moneylenders Act, 1927. It may be called a con-

sideration of the arithmetic of moneylending under the Act. Though a certain sum is charged as interest, the actual rate represented by that sum is determined by actuarial calculation and stated in the memorandum. It was claimed that such an arrangement was defeated by sect. 15 (2) of the Act, which requires instalments to be allocated to principal and interest in definite proportions, but it is held that the section does not apply, as this was a loan at an actual rate of interest. The other point concerns the working out in practice of what interest may be charged under sect. 7 of the Act without being defeated as a charge of interest upon interest. It is decided that, after default, payments on account may be appropriated to interest so long as all interest, both before and after such payment on account, is calculated on the total sum due at the moment of default.

AS TO MEMORANDUM OF MONEYLENDER'S CONTRACT AND PROHIBITION OF COMPOUND INTEREST, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190-192, paras. 280, 281; and FOR CASES, see DIGEST Supp., Money and Moneylending, Nos. 353a *et seq.*]

Cases referred to :

- (1) *Parkfield Trust, Ltd. v. Curtis*, [1934] 1 K.B. 685; Digest Supp.
- (2) *Mason & Wood, Ltd. v. Greene*, [1936] 2 K.B. 370; [1936] 2 All E.R. 509; Digest Supp.
- (3) *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380; Digest Supp.

ACTION by moneylenders for the balance of money lent and interest thereon.

The transaction which was the subject matter of the claim was the latest of a series of transactions between the parties. According to the memorandum the borrower agreed :

to repay to the lenders the principal sum of £500 together with interest thereon at the rate of 34.64 per cent. per annum by equal instalments of £29 3s. 4d. paid monthly . . . in accordance with the following schedule of repayments . . . The principal sum to be advanced shall be applied by the lenders to discharge the amount of £301 19s. 10d., owing to the lender by the borrower under and by virtue of a memorandum of agreement dated Sept. 25, 1933, and made between the lenders and the borrower.

The early instalments paid by the defendant were appropriated as to half to interest and as to half to principal, and that in later instalments, a bigger proportion was appropriated to principal; for this reason the principal due at any moment of time after the beginning was less than that recorded in the memorandum, and the rate of interest at any time before the end of the transaction was higher. In effect a lump sum of £200 was being paid by way of interest in the long run, and that if this £200 was treated as a lump sum for the purposes of calculation according to the schedule to the Act, the resultant rate of interest would be more than 34.65 per cent. It appeared that the plaintiffs' method was actuarially calculated in order to secure the complete repayments in the fixed time, and it was not suggested that the transaction was harsh or unconscionable.

The Moneylenders Act, 1927, provides :

6. (2) The note or memorandum . . . shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the

principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of sched. 1 to this Act.

7. Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money by a moneylender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract : A

Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the moneylender under the contract, whether in respect of principal or interest, the moneylender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default, and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan. B

15. (2) Where by a contract for the loan of money by a moneylender the interest charged on the loan is not expressed in terms of a rate, any amount paid or payable to the moneylender under the contract (other than simple interest charged in accordance with the proviso to sect. 7 of this Act) shall be appropriated to principal and interest in the proportion that the principal bears to the total amount of the interest and the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of sched. 1 to this Act shall be deemed to be the rate of interest charged on the loan. C

Harold Simmons for the plaintiffs.

G. O. Slade for the defendant.

Slade : This is not the ordinary payment of interest, but the payment of a lump sum disguised as rate of interest in order to avoid the effect of the statute as explained in *Parkfield Trust, Ltd. v. Curtis* (1), and in *Mason & Wood, Ltd. v. Greene* (2). Actually the payment of capital and interest by instalments is incompatible with the maintenance of a constant rate of interest. Here, at all events, the result is to make the memorandum inaccurate as a statement of the amount of principal and the rate of interest at various stages. *Lancashire Loans, Ltd. v. Black* (3) is in point, *per SCRUTTON, L.J.*, at p. 406. The memorandum is faulty here because of the insufficiency of the details of the previous transaction. Also there is a charge of interest upon interest other than is allowed by sect. 7 of the Act. D E F

Simmons : The Act says nothing to prevent a moneylender using the instalment method in conjunction with an actual rate of interest. As far as the previous transaction is concerned, it would be beyond the scope and purpose of a memorandum to furnish details of the previous transaction. G

PORTER, J. : This is an action brought by certain registered moneylenders against a Mr. Sanderson, and the question which arises is, putting it shortly, in substance whether the Moneylenders Act has been complied with, and the proper memorandum has been made out and given of the sum due, or whether some omission or wrong statement has taken place. The actual sum which is said to be due upon the memorandum is the principal sum of £500, upon which interest of £200 is charged, and that H

is set out in the document. The charging of the sum of £200 as interest on £500, I gather, works out at 34.65 per cent., and that is also stated in the document. In this case it was desired, as often is desired in cases where money is lent, that the money should not be repaid as a whole, but by instalments, and those instalments are to include both principal and interest, and, if you are going to charge interest at 34.65 per cent. and pay off the total sum of principal and interest by sums of £29 odd every month, an actuarial calculation must be made to find how much of that sum is to be attributed to interest and how much to capital. That has been done, and is actually set out, month by month, for 24 months, showing the amount which the moneylenders desired, and, subject to what I may say hereafter, rightly intended to be charged, as interest at 34.65 per cent., month by month. Of course, that involves that it should be paid off by way of instalments which would include capital, and whatever is not interest will be a repayment of the capital, and that will reduce the amount of capital due, and will mean that the next time, for the same instalment, as the interest on the smaller sum will be less, the repayment of the capital will be greater.

A further fact about the memorandum in this case is that there is a default clause on the back, and, if an instalment is more than seven days overdue, then the whole of the balance of the principal will become due, and interest to date. That being due, the clause further states that :

The principal sum outstanding in the schedule of repayments shall become immediately repayable together with the instalment of interest due as shown in the schedule aforesaid, together with simple interest at the rate per centum per annum aforesaid on the sum payable (whether for principal or interest) until payment, and such interest shall not be reckoned as part of the interest charged in respect of the loan.

I will come to the end of that clause later, but the reason that that is put there, as I follow it, is in order to comply with the Moneylenders Act, 1927, s. 7. Cl. 3 states that the principal sum to be advanced is to be applied to discharge an advance of £301 19s. 10d., owing by the borrower, by virtue of the memorandum or agreement dated Sept. 23, which is a previous loan, and then there is an acknowledgment, which I need not read, at the bottom of the document. Mr. Slade takes certain points about the propriety and legality of the document in that form. There is no doubt that £500 was advanced in this sense, that £301 19s. 10d. was taken as being paid on the previous debt, and the rest of the £500 was handed over on June 14, 1935, which is the date of the instrument in question.

The first question which arises is, where you have determined that the rate of interest stated in the document shall be at a fixed rate, can you arrange, at the same time, to repay the principal and interest by instalments? Must not the principal be payable in one sum, together with interest, on a date or dates? Mr. Slade says that you cannot,

where you state an actual rate of interest, and not a notional rate of interest, pay except in one sum. That would be a doctrine which would prevent, in the majority of moneylender cases, the system of payment by instalments, and I have no doubt it would, in a great many cases, prevent it, unless they provided for interest at a fixed sum and, in accordance with the schedule to the Act, at a notional rate. The practical ground on which Mr. Slade puts his argument is this. He says, if you take the Act, and apply the schedule, the position is this: you may charge 48 per cent. without being in danger of being said to be harsh and unconscionable, but if you charge that 48 per cent. and repay that according to the schedule, you must keep the proportions of repayment as between capital and interest the same as the ratio which the capital bears to the interest. That is to say, in this case you have £500 capital and your interest is £200; then, whenever you repay any sum, that sum must be attributed to capital five units, and, as to interest, two units. Mr. Slade says in this particular case one may see, by looking at the schedule of repayments, that that has not been done: for instance, in the first instalment, it is almost equal, not 5 to 2, and he says that thereby the borrower was at a disadvantage, because he pays more interest and less capital, and therefore leaves more capital unpaid, and the interest is therefore higher than it would be if you kept it in the proportions required by the Act. No doubt it is true that, in that way, the moneylender gets more advantage than he would do if he followed the schedule to the Act, but I think the Act has left it open to the lender to charge it in either of two ways, and, if he does choose to charge by way of an actual and not a notional rate, then the provision for the repayments, in the ratio I have mentioned, does not arise. It may be that the lender does get an advantage and more interest in that way, but, unless the Act prevents him doing it, it is not for me to determine that he should not get it. And, indeed, in this case, from the arguments deduced, I gather there has been no harsh or unconscionable bargain.

The only other argument I understood Mr. Slade to put forward with regard to that part of the case is this. He suggested that the point which he is making could be illustrated by looking at what the document itself says. The document first of all says that :

Whereas the lender has lent £500 to the borrower (hereinafter called the principal sum) [and then he says you have to find out what the principal sum is, and also you have to find out what the repayment is, and you find it in the next clause]. The borrower will repay to the lender the principal sum [and the principal sum there must mean only the principal sum] and the borrower will repay £500 together with interest by equal instalments—

that is, the interest on the £500. Then, Mr. Slade says, if you look at the schedule below, they are not paying interest on £500, but interest on £500 or such less sum as may then and there be due. That is a subtle and fine point, and I think it is too subtle, because, reading this thing

broadly, and looking at the document broadly, I do not think myself it means : I am paying you £500. It does not mean : I am going to pay the same interest all the time. It does mean : I am only going to pay you such sum as is due. If you read para. 1 of the schedule, that is the plain
 A meaning of the document. In my view, there is no real difficulty, and I think the document does set out the terms and the way in which the sums have to be attributed to capital and interest.

The second point is the question as to whether the lender has accurately set out in the document the amount which was due in respect of
 B the past loans. It is said that that is not accurate, because it is not full enough, but merely states the amount, without stating how the amount is made up. I do not follow that it is obligatory upon the lender to state how the amount is made up. The duty upon him is to state what in fact is due, and if in fact it is accurate, and does state what is due,
 C although it does not state why it is due or how it is made up, I think the Act has been complied with.

The final argument presented was that here there was a charge of interest upon interest, and that that can be seen by the accounts, which were produced at Mr. Slade's request this morning. I think there would
 D be a great deal to be said for the argument, except for cl. 7. In my view, the charge in this case is covered by the provision in cl. 7, which says this : If there is default, then at that moment the debt becomes crystallised, with so much still due for principal and so much for interest, and the Act says, as I follow it, you can add those two sums together and you
 E can charge interest on those, but you must not charge interest on any more than those. In my view, in this case the lenders have not charged interest on anything more than those two sums. What they have done is that they have just taken the round figure on p. 3, in dealing with the particular transaction which is the issue in this case, and they have added
 F £438 9s. 7d., which is the amount admittedly due in respect of the instalments of principal at the date of the default, and to this they have added the interest due on the last instalment in default, namely, £12 13s. 3d., and they have added those two together, as I say, in accordance with the Act, and they have charged interest on those. After that, they have
 G taken interest at a particular date, and the date is chosen because it happens to be the date when payment was made, and then £451 2s. 10d. was due as capital and £173 0s. 5d. as interest. £169 9s. 7d. is paid, and the lenders attributed the £169 to the payment of interest, which leaves £3 10s. 10d. due in respect of interest, and £451 2s. 10d. still due for
 H capital and interest, which is the capital and interest upon which interest is not to be charged. They have then carried down the sum of £451 2s. 10d. and £3 10s. 10d., making £454 13s. 8d., to which they have added interest, not on the £454 13s. 8d., which would be wrong, but on the £451 2s. 10d., which, in my view, is right, and then we get the total

sum of £478 4s. 9d. due. They have taken that interest up to May 30, because a payment was made on that date of £178 3s. 8d., and, in my view, they are entitled to attribute that £178 3s. 8d. first of all to interest, which they have done, and, secondly, to capital, which they have done, leaving a capital amount of £300 1s. 1d. due on that date, and on which they have charged interest. In my view, there has been no charge of interest upon interest, except such interest upon interest as is permitted by sect. 7 of the Act, and, therefore, in my judgment, they are entitled to recover the amount claimed in the order, and there will be judgment for that amount with costs. A B

Judgment for plaintiffs for £744 2s., with costs.

Solicitors: *Beard, Sons & Sparkes* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Cleaver & Co.*, Liverpool (for the defendant).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law.] C

PRICE v. REPRESENTATIVE BODY OF THE CHURCH IN WALES.

[CHANCERY DIVISION (Luxmoore, J.), January 11, 12, 18, 1937.]

A *Ecclesiastical Law—The Church in Wales—Existing interests at passing of Welsh Church Act, 1914—Holder of ecclesiastical office—Annuity—Appointment to new office with special stipend—Rights of holder of office—Welsh Church Act, 1914 (c. 91), s. 18 (e).*

The plaintiff was the rector of Coity at the time of the passing of the Welsh Church Act, 1914, and under sect. 18 (e) of that Act he became entitled to an annuity of £528 13s. 6d. so long as he should hold an ecclesiastical office in the Church in Wales. In 1933 he became vicar of Penmark, and as the holder of that office he became entitled to receive some £240 per annum under the terms of a certain bequest. In this action he claimed a declaration that he was entitled to receive the annuity of £528 13s. 6d. without deduction. The defendants contended that they were entitled to deduct a sum from the annuity equal to the amount of the income of the bequest by virtue of an arrangement which the plaintiff had made with the defendants' secretary at the time of his induction to the office of vicar of Penmark. Alternatively they contended that they were entitled to make the deduction under certain rules and regulations of the Governing Body of the Church in Wales :—

D HELD : (i) upon a proper construction of the Welsh Church Act, 1914, apart from any arrangement, and apart from any rules or regulations affecting the matter, the plaintiff was entitled to receive an annuity of £528 13s. 6d. without deductions in respect of the annual payment of £240 so long as he should hold an ecclesiastical office in the Church in Wales.

E (ii) the court was not, in the circumstances of the case, justified in drawing an inference that the plaintiff had agreed to permit the deduction from the annuity of the amount he received as vicar of Penmark under the bequest.

F (iii) there was not in existence any rule or regulation of the Church in Wales to the effect that an incumbent entitled to an annuity should, upon appointment to a new ecclesiastical office, receive either such annuity or the stipend of the new office, whichever should be the greater, and no question arose, therefore, whether such a rule or regulation was *ultra vires*.

[EDITORIAL NOTE. Upon the disestablishment of the Church in Wales, incumbents who had held what might be called a freehold office were entitled to receive an annuity so long as they held an ecclesiastical office in Wales. The annuity, therefore, continued although the annuitant was appointed to a new office. In the present case the annuitant was appointed to an office, the holder of which, through a generous gift by will, had the right to receive some £240 in addition to his stipend. The question at issue was whether the annuitant was entitled to receive this sum in addition to the annuity or whether it should be deducted therefrom.

AS TO EXISTING INTERESTS AT DISESTABLISHMENT, see HALSBURY, Hailsham Edn., Vol. 11, p. 583, para. 1029; and FOR THE WELSH CHURCH ACT, 1914, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 6, p. 1161 *et seq.*]

ACTION by the plaintiff, the Rev. T. P. Price, against the Representative Body of the Church in Wales, for a declaration that the plaintiff was entitled to have paid to him by the defendants an annuity of £528 13s. 6d.

so long as he should hold the office of vicar of Penmark or any other ecclesiastical office in the Church in Wales, and that so long as he should hold the office of vicar of Penmark the defendants were not entitled to deduct from his said annuity any sum payable to him as holder of that office under or by virtue of the will of the late Dr. George Neale. A

The plaintiff was formerly rector of Coity, in the county of Glamorgan, and held that office by freehold tenure at the date of the passing of the Welsh Church Act, 1914. The emoluments of the office consisted of tithe rentcharge issuing out of land in the county of Glamorgan. By reason of the passing of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, the tithe rentcharge appropriated to the office held by the plaintiff became vested in the Welsh Commissioners for the purposes provided by those Acts. But by the said Acts the plaintiff became entitled to receive an annuity, as calculated by the Acts, in lieu of the tithe rentcharge formerly received by him, and this annuity the plaintiff is entitled to receive so long as he holds an ecclesiastical office in the Church in Wales. B C

The plaintiff remained rector of Coity until July, 1933, when he became vicar of Penmark. Dr. George Neale, who died on Sept. 15, 1917, bequeathed the sum of £6,000 to be invested and the income therefrom paid to the incumbent of the parish church of Penmark in augmentation of the annual stipend of such incumbent. D

The defendants claimed that they were entitled to deduct the income, received by the plaintiff by virtue of this bequest, from the amount of the annuity payable to him. The defendants contended the plaintiff was not entitled to the annuity, as claimed, except in accordance with the rules and regulations made by the defendants by the authority of and with the consent of the Governing Body of the Church in Wales. If such rules and regulations were not binding upon the plaintiff, the defendants contended that, upon his induction to his new office, the plaintiff ceased to be entitled to receive the annuity referred to. The defendants counter-claimed for a declaration that either the said rules and regulations or an arrangement made between the plaintiff and the defendants bound the plaintiff, and that, while the plaintiff received the annuity, he must submit to a deduction from it equal to the amount of the income of the Neale bequest, or, in the alternative, that, upon being instituted and inducted to the office of vicar of Penmark, the plaintiff ceased to be entitled to the annuity, and that the same became part of the general funds of the defendant body. E F G

Hon. Sir Stafford Cripps, K.C., R. Gwyn Rees and G. Granville Slack H for the plaintiff.

Gavin Simonds, K.C., W. N. Stable, K.C., and F. H. L. Errington for the defendants.

Cripps, K.C.: The question which is raised in this case is one of

some importance to a number of incumbents of the Church in Wales. There is no bitterness or feeling about the matters in dispute, but the parties want an authority as to what are their rights. The plaintiff receives annually, as vicar of Penmark, a sum of about £240 a year by

- A virtue of the will of a certain Dr. Neale who died in 1917. The defendants claimed, by virtue of certain rules and regulations, to deduct from the annuity payable to the plaintiff, under the Welsh Church Act, 1914, an amount equal to the income received from the Neale bequest. But the Representative Body has no power to make regulations except for
- B the procedure of its committees. It has no power to make rules and regulations as to the matter in issue. By the Welsh Church Act, 1914, s. 13, the Governing Body, as it is now called, can frame constitutions and regulations for the government of the church. Such authority cannot be delegated. The use of the word "frame" shows quite clearly that the
- C Governing Body is to be the originating body. If the Representative Body purports to make rules and regulations, except for the procedure of various committees, they cannot be binding upon anybody. There are no other regulations referred to in the Act.

- The material provision of the Welsh Church Act, 1914, s. 18 (e), is
- D that the holder of any ecclesiastical office of the Church in Wales shall, subject to any arrangement made between him and the Representative Body, be entitled, in lieu of his existing interest, to an annuity calculated in the manner provided so long as he is the holder of ecclesiastical office in the Church in Wales. There is no qualification of any sort or
- E kind, and if it had been intended that a deduction should be made in the event of a bequest of a sum of money, it would have been quite simple to have included such a provision.

- Simonds, K.C.*: The Church in Wales has acted upon the footing of a certain interpretation of the Welsh Church Act, 1914. It has
- F assumed, and based its resolutions upon the assumption, that an incumbent, on being moved to another office, thereby becomes under an obligation to hand over whatever represented his existing interest, to use the words of the Act. This was so whether the interest had been commuted and was in the form of an annuity or not. That was a true
- G construction of the Act. The plaintiff was told and was well aware what would be the terms of remuneration if he accepted the living of Penmark. The holder of an ecclesiastical office was to retain his interest in the emoluments of his office, whatever form they might take, whether secularised or not. But if he moved to another office, he must repay the
- H net income of his first office to the Representative Body. It was not the policy of the Act to endow the incumbent and to give him something he had not before the Act was passed. If the defendants were wrong upon their construction of the Act, the plaintiff's right to receive the annuity must be subject to one of two things. Either it must be subject

to a contractual variation of that right, or to a variation by virtue of duly made regulations of the Church in Wales. The arrangement relied upon by the defendants was one made between Mr. Morgan, the secretary of the Representative Body, and Mr. Price. The court is asked to draw an inference of such an arrangement from letters which passed between the parties. There is no right conceded by the Act itself which may not be abrogated by the Church in Wales. This Act sets up what LORD CRANWORTH in the case of the Church of Scotland called *imperium in imperio*. The Church can make such laws as it thinks best for the good of the Church as a whole, and there is no limit to its powers. This is subject to the right of the incumbent to receive the annuity secured to him by the Act of 1914, unless he entered into an arrangement whereby he would receive some other sum. A B

Cripps, K.C., in reply: Sect. 18 of the Act is an alternative method to that laid down by sects. 14 and 15, and provides for commutation. Sect. 18 is a code in itself to be applied to this particular kind of property if and when commutation happens. So soon as sect. 18 applies, sect. 14 must fall to the ground, as there is nothing left for it to operate upon. If the commutation is to be carried out, as stated in sect. 18, subject to any arrangement which might be made between the Representative Body and the individual, the individual would be entitled to be paid, but he could make arrangements with the Representative Body for any part to be retained if he so wished. If they were to get all in any event, such a provision would be unnecessary and meaningless. Read with subsect. (g), it was the intention that the incumbent should in every contingency receive the sum, unless he himself arranged with the Representative Body that he should receive a different sum. He might be prepared to forgo it, but it is only on the basis of arrangement that there could be any question of the operation of sect. 18. With regard to the alleged agreement, that was completely negatived. It was quite obvious that the secretary could not act in a matter of this kind without the authority of the Representative Body, and there was no authority for the Representative Body to deal with this matter until the resolution of July 28, 1933, was passed. It was not until long after that date that the Representative Body made up its mind on that point. Sect. 8 (2) draws a clear distinction between church and secular property. Sect. 18 gives to the holder of an ecclesiastical office an absolute right to receive an annuity. The only limitation upon that right is an agreement by which he consents to forgo it. Sect. 18 (g) imposes upon him obligations which are only consistent with the continued payment of the annuity. Therefore the plaintiff is entitled to the declaration for which he asks. C D E F G H

LUXMOORE, J.: On Sept. 18, 1914, the day on which the Welsh Church Act, 1914, was passed, the plaintiff held the office of rector of

- the parish of Coity with Nolton Chapel, in the county of Glamorgan. The emoluments of the office at that date included, among other things, tithe rentcharge to the total annual value of £520 4s. 1d. and an annual sum of £8 9s. 5d. derived from investments representing the proceeds
- A of the redemption of tithe rentcharge effected before that date. The plaintiff continued to hold the office of rector of Coity with Nolton Chapel until his resignation on July 2, 1933. On July 3, 1933, he was instituted and inducted to the office of vicar of Penmark. On Apr. 18, 1934, the plaintiff started this action against the Representative Body
- B of the Church in Wales, a corporation incorporated by royal charter under the provisions of the Welsh Church Act, 1914. The relief claimed is a declaration that the plaintiff is entitled to have paid to him by the defendants an annuity of £528 13s. 6d. so long as he holds the office of vicar of Penmark or any other ecclesiastical office in the Church in Wales,
- C and that, so long as he holds the office of vicar of Penmark, the defendants are not entitled to deduct from the annuity of £528 13s. 6d. any sum payable to him under the trusts declared by the will of Dr. George Neale, who died on Sept. 15, 1917. Dr. Neale had by his will bequeathed a legacy of £6,000 upon trust for investment and payment of the income
- D in perpetuity to the incumbent for the time being of the parish of Penmark. At the date of the plaintiff's institution and induction as vicar of Penmark, this legacy was represented by a sum of £4,866 17s. 2d. 5 per cent. conversion stock standing in the name of the official trustee of charity funds. The defendants claim that the plaintiff is only entitled
- E to receive while he is vicar of Penmark a total annual sum of £528 13s. 6d. and must bring into account against it the income he receives from Dr. Neale's bequest. The annuity of £528 13s. 6d. is payable under the provisions of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, relating to the commutation of what
- F are described in sect. 18 (a) of the first-named Act as :

the existing interests of the holders of all ecclesiastical offices in the Church in Wales

- in certain classes of property defined in that Act. The particular class of property in the present case is tithe rentcharge and all payments
- G in lieu of or in the nature of tithes or tithe rentcharge. The solution of the questions which arise depends chiefly on what is the proper construction of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, but questions of fact also arise for consideration.

- H The Welsh Church Act, 1914, provided for the disestablishment of the Church of England in Wales and Monmouthshire, called in the Act the Church in Wales, and for the vesting and distribution of its property. The Act provided a date for the disestablishment. This date was postponed, and by subsequent legislation Mar. 31, 1920, was ultimately

fixed as the date of disestablishment. On this date, every cathedral and ecclesiastical corporation in the Church in Wales, whether sole or aggregate, was dissolved (see sect. 2). Sect. 3 provides that as from Mar. 31, 1920, the ecclesiastical law of the Church in Wales should cease to exist, and that from that date the then existing articles, doctrines, rites, rules, discipline and ordinances of the Church of England should, with and subject to such modification or alteration as after the passing of the Act might be duly made therein, according to the constitution and regulations for the time being of the Church in Wales, be binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound and should be enforceable in the temporal courts in relation to any property which, by virtue of the Act, is held on behalf of the Church in Wales or any member thereof in the same manner and to the same extent as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound. Sect. 4 provides that as from Mar. 31, 1920, all property specified in that section, which includes property belonging to or appropriated to the use of any ecclesiastical office in the Church in Wales or the holder of any such office as such, should vest in a body constituted under the Act under the title of the Welsh Commissioners. Sect. 8 directs the Welsh Commissioners to transfer in the manner therein mentioned the property vested in them by the Act. The property to be transferred is divided into two classes, viz., property which was to remain ecclesiastical and that which was to be secularised. The latter class includes tithe rentcharge (defined in sect. 38 of the Act as including "all payments in lieu of or in the nature of tithes or tithe rentcharge") which was before the date of disestablishment appropriated to the use of any parochial benefice of the Church in Wales but does not include any tithe rentcharge or property of like nature given for ecclesiastical purposes by way of private benefaction as defined in sect. 7 of the Act. By sect. 8 (1) (c) it is directed that the tithe rentcharge is to be transferred to the appropriate county councils specified in that subsection. Sect. 8 (2) directs that, save as otherwise provided by this Act, all property transferred under this section shall be held subject to all existing public and private rights with respect thereto and all tenancies, charges and incumbrances which might at the date of the transfer be subsisting therein, and, in the case of all such property except tithe rentcharge transferred to a county council, subject to the existing interests of all persons who on Sept. 18, 1914, held ecclesiastical offices in the Church in Wales, and in the case of such tithe rentcharge, subject to the obligation to make the provision required by the Act in lieu of such existing interests therein.

Sect. 13 provides for the constitution of a representative body of the Church in Wales, and confers on it power to frame constitutions

and regulations for the general management and good government of the Church in Wales and the property and affairs thereof, whether as a whole or according to dioceses. It is under this section that the defendant body was incorporated by charter on Apr. 15, 1919.

- A Sect. 14 (1) provides that any person who on Sept. 18, 1914, held an ecclesiastical office by freehold—as was the case of the plaintiff in respect of the rectory of Coity with Nolton Chapel—shall retain his existing interest in the emoluments of that office so long as he holds that office or any other ecclesiastical office in the Church in Wales to
 B which he may be nominated or appointed after Sept. 18, 1914, whether before or after Mar. 31, 1920. By subsect. (2) such an existing interest is to determine after the expiration of 6 months from the date when the holder ceases to hold any ecclesiastical office in the Church in Wales. Pausing here, it seems plain that under this provision the plaintiff
 C retained his interest in the emoluments of Coity with Nolton Chapel so long as he remained rector of that parish, and that he will continue to retain that interest so long as he holds any other ecclesiastical office in the Church in Wales—such, for example, as the office of vicar of Penmark—and for 6 months after he ceases to hold that office. Subsect. (1),
 D however, contains a proviso to the effect that when a person who held such an office as the rector of Coity on Sept. 18, 1914, is subsequently appointed to another ecclesiastical office in the Church in Wales, he must, “except as otherwise expressly provided by the Act,” pay over the net income of the ecclesiastical office held by him at the passing of
 E the Act to the Representative Body. It is to be observed that what is to be paid to the Representative Body under the proviso is not the emoluments of the office held at the passing of the Act but the net income of that office—and that net income is defined as having the same meaning as the expression “annual value of a benefice” has in the Incumbents
 F Resignation Act, 1871. There is no express mention of tithe rentcharge in this section, but there can be no doubt that tithe rentcharge is included in the phrase used in the section, “emoluments of office.”

- Sect. 15 (1) contains provisions as to tithe rentcharge. It directs that an annual sum, to be ascertained in the manner stated in the section,
 G shall be paid to each person who had any “existing interest” in any tithe rentcharge transferred to a county council under the Act :

in substitution for and in satisfaction of that interest, and so long as that interest would otherwise have continued . . .

- i.e.*, so long as the person holds any ecclesiastical office in the Church in
 H Wales and for 6 months afterwards. The payment is not to be made directly to the person mentioned, but is to be paid by the appropriate county council to the Representative Body “upon trust to pay over the same to the person who had such an existing interest,” and the amount so payable is charged on the county fund. The county council

and the Representative Body are to be deemed to be the owner of the tithe rentcharge attached to a benefice for the purposes of the Tithe Rentcharge Rates Act, 1899, so long as the holder of the benefice continues to be entitled to the amount payable in respect of such tithe rentcharge under sect. 15, but no longer. There is an express provision A that the holder of any ecclesiastical office in the Church in Wales, so long as the amount payable to him under sect. 15 is paid, is not to be relieved of any liability to repair any ecclesiastical building to which, as owner of tithe rentcharge, he was subject immediately before Sept. 18, 1914. It is difficult to understand the precise effect of this section with reference B to the proviso to sect. 14 (1), for, although, no doubt, any annual sum payable under the provisions of sect. 15 is to be ascertained with regard to the tithe rentcharge included in the emoluments of the ecclesiastical office held on Sept. 18, 1914, sect. 15 does not provide that the annual amount payable under it to any person having an existing interest in C tithe rentcharge shall be deemed to be an emolument of the ecclesiastical office held by him on Sept. 18, 1914, or that it shall be taken into account in ascertaining the net income of such office for the purposes of the proviso. Moreover, the express provision that the county council is to pay each annual sum payable under sect. 15 to the Representative D Body "upon trust to pay over the same" to the person entitled to the existing interest, is difficult to reconcile with the direction contained in the proviso in the case where there has been a change of ecclesiastical office after Sept. 18, 1914. It is, however, not necessary for me to attempt to solve these difficulties, for the annuity in question does not arise E under this section but under sect. 18.

This section provides a scheme for the commutation of the existing interests of the holders of all ecclesiastical offices in the Church in Wales in what I have referred to as the property to be secularised, including tithe rentcharge. These existing interests were preserved by the Welsh F Church Act, 1914, s. 14. Under sect. 18 the scheme for commutation was optional, and its applicability depended on the volition of the Representative Body. This option was in effect taken away by the Welsh Church (Temporalities) Act, 1919, for sect. 3 of that Act provides that the Welsh Church Act, 1914, s. 18, shall have effect as if the Representative G Body had exercised the option. Sect. 18, having regard to the provisions of the Welsh Church (Temporalities) Act, 1919, provides (so far as is material to the present case) that as from Mar. 31, 1920, the existing interests of the holders of all ecclesiastical interests in the Church in Wales in all property vested in the Welsh Commissioners and by them H to be transferred to the county councils (i.e., the tithe rentcharge appropriated to parochial benefices) shall determine, and the provisions of this Act respecting existing interests in such property and the payment of money in substitution for and in satisfaction of such interests shall

- cease to have effect. Under this provision, the plaintiff, as rector of Coity with Nolton Chapel, ceased, as from Mar. 3, 1920, to have any interest in the tithe rentcharge appropriated to that rectory, and the provisions of sects. 14 and 15 cease to have any effect with regard to his
- A existing interest, for it is plain that sect. 14 contains provisions in respect of existing interests in property which includes the tithe rentcharge appropriated to the rectory of Coity with Nolton Chapel at the date of disestablishment, and that sect. 15 provides for the payment of money in substitution for and in satisfaction of those interests. It follows, in
- B my judgment, that as from the date of disestablishment, viz., Mar. 31, 1920, the plaintiff's rights (if any) in respect of the tithe rentcharges appropriated to the rectory of Coity must be sought under the scheme for commutation contained in sect. 18.

- By sect. 18 (b) the Welsh Commissioners are directed to pay to the
- C Representative Body the aggregate value of the existing interests of holders of ecclesiastical offices in the Church in Wales in tithe rentcharge and the other property to be secularised. This is a capital sum to be ascertained as provided in the fourth schedule to the Act, and is to bear interest from Mar. 31, 1920, until payment. Sect. 18 (e) provides that
- D the holder of any ecclesiastical office in the Church in Wales, as defined in the subsection, and the plaintiff is clearly within this definition :

- shall, subject to any arrangements which may be made between him and the Representative Body, be entitled, in lieu of his existing interest in such property as aforesaid [*i.e.*, the tithe rentcharge appropriated on Sept. 18, 1914, to the parochial benefice of Coity with Nolton Chapel], to an annuity calculated in manner provided by the fifth schedule to this Act [*i.e.*, an annuity of £528 13s. 6d.] so long
- E as he continues to hold an ecclesiastical office in the Church in Wales.

- The words are plain : under the section the plaintiff is entitled to an annuity of £528 13s. 6d. so long as he holds an ecclesiastical office in the Church in Wales, and the only limitation on his right is such arrangement
- F (if any) as may have been made between him and the Representative Body. If no such arrangement was in fact made, then his right would appear to be absolute. No part of sects. 14 or 15 can apply to this annuity, for such provisions as are contained in those sections respecting the plaintiff's existing interests in the tithe rentcharge appropriated to the rectory of
- G Coity, and the payment to him by the appropriate county council through the Representative Body of the annual sum provided by sect. 15, are expressly excluded from operating.

- It appears to me that, on the true construction of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919,
- H the provisions of sect. 18 of the former Act are a separate code fixing the rights and interests of persons entitled to existing interests on Sept. 18, 1914, in the particular event of the commutation of the whole of those existing interests. Subsect. (f) provides that every annuity payable under sect. 18 shall be charged on the property for the time being vested

in the Representative Body and shall be treated as part of the emoluments of the ecclesiastical office which the annuitant held at the passing of the Act. In my judgment, this subsection has no substantial bearing on the question I have to determine. It cannot, I think, be construed as operating to keep in force any of the provisions of sect. 14, for sect. 18 (a) **A** expressly negatives the continued operation of any part of sect. 14. This view is strengthened by the presence in subsect. (e) of the words :

subject to any arrangements which may be made between [the holder of the ecclesiastical office] and the Representative Body.

For if the proviso of sect. 14 is applicable to an annuity under sect. 18, **B** these words are without any sensible meaning. The provisions in subsect. (f) that an annuity under sect. 18 is to be treated as part of the emoluments of the ecclesiastical office are necessary, on the footing that sect. 18 affords a distinct code with regard to secularised property in order to preserve the rights of incumbrancers as against the particular **C** annuitant. For similar reasons, subsect. (g) is necessary to preserve the annuitant's liability for the repairs he would have been liable to execute if he had retained his interest in the tithe rentcharge.

My attention has been called to sect. 21, which relates to vacancies occurring in any ecclesiastical office in the Church in Wales during the **D** period between Sept. 18, 1914, and Mar. 31, 1920. In my judgment, no assistance with regard to the construction of sect. 18 is to be obtained from this section.

I therefore hold that, on the true construction of the Act, and apart from any question whether there was an arrangement between the **E** plaintiff and the Representative Body, within the meaning of sect. 18 (e), affecting the plaintiff's right to the annuity under the section, and apart from any question whether there are any contributions or regulations affecting the plaintiff's right, the plaintiff is entitled under sect. 18 of the Act to the annuity of £528 13s. 6d. so long as he holds an eccle- **F** siastical office in the Church in Wales.

It remains to be considered, first, whether there was any such arrange- ment as that to which I have referred, and, if there was no such arrange- ment, whether there is any constitution or regulation affecting the plaintiff's right. The plaintiff was instituted and inducted to the vicarage **G** of Penmark in July, 1933. Before he accepted the preferment, there were conversations between the plaintiff and Mr. Morgan, the then secretary of the Representative Body. Unfortunately, Mr. Morgan is dead. The plaintiff has given no evidence as to what transpired between himself and Mr. Morgan. Mr. Simonds, on behalf of the Representative **H** Body, has asked me to infer that there was an arrangement under which the plaintiff agreed to accept the vicarage of Penmark on the footing that he would be entitled to receive the annuity of £528 13s. 6d., but would bring into account against it the income of Dr. Neale's bequest.

I am asked to infer this from (a) the fact that the practice adopted by the Church in Wales with regard to a person who held an ecclesiastical office on Sept. 18, 1914, and was, subsequent to Mar. 31, 1920, transferred to another ecclesiastical office in the Church in Wales, was to allow
A to such person in respect of the new office a stipend equal to the amount of his existing interest on Sept. 18, 1914, or the stipend assigned to his new office, including the income derived from any trust fund existing before Mar. 31, 1920, attached to that office, whichever should be the greater; and (b) the correspondence passing between the plaintiff,
B on the one hand, and Mr. Morgan on the other, before the plaintiff was instituted and inducted to the vicarage of Penmark, and the correspondence between the same persons in Sept., 1933, and on Jan. 2, 1934, and also between the plaintiff's solicitors and Mr. Morgan subsequent to the last-mentioned date. It is admitted that Mr. Morgan had no
C power to make any arrangement without the authority of the Representative Body, and it was not suggested that any such authority was conferred on Mr. Morgan. In the circumstances, I do not think I should be justified in drawing any such inference as the defendants asked me to do.

It was said that rules and regulations were made by the Representative
D Body under the authority or with the consent of the Governing Body of the Church in Wales, and that those rules and regulations, which were in force on July 3, 1934, when the plaintiff was instituted and inducted to the vicarage of Penmark, provided that the income of trust funds held in trust for a living before Mar. 31, 1920, should be deemed to form
E part of the stipend of the living, and that an incumbent entitled to an annuity under the Welsh Church Act, 1914, s. 18, upon taking up a new ecclesiastical office in the Church in Wales, should be entitled to receive, by way of stipend, either the annuity or the actual stipend attached to the new office, whichever should be the greater, and that the plaintiff,
F by the declaration made by him upon his institution and induction to the vicarage of Penmark, consented to be bound by, and to submit to, all the canons of the Church in Wales, and all the rules and regulations which had theretofore been made, or which might from time to time be made by or under the authority or with the consent of the Governing Body
G of the Church in Wales.

The constitution of the Church in Wales is contained in 12 chapters. A copy of this constitution, as amended in 1930, 1931 and 1932, is set out on pp. 297 to 400 of the official Handbook of the Church in Wales for the year 1933. It is admitted that no such rule or regulation as is
H relied upon by the Representative Body is to be found in the constitution, but it is said that such a rule or regulation was made on July 31, 1924. A copy of the resolution of this date is to be found on p. 6 of the agreed bundle of correspondence. It is in these terms:

That while the Representative Body accepts the opinion of counsel on the question

of vested interests, it is prepared to bind itself to continue the existing practice in regard to the stipends payable to incumbents with vested interests who move to other benefices, and it requests the drafting committee to submit to the next meeting of the Representative Body a form of words which will make effective this decision.

It is not suggested that there was any subsequent consideration of any form of words or draft as is referred to in this resolution. Having regard to the form of the resolution, I think it is plain that no such rule or regulation as is relied on by the Representative Body ever existed. It is unnecessary, therefore, to consider the question whether, if such a rule or regulation existed, it was *ultra vires* the Representative Body or the Governing Body.

In the result, I hold that the plaintiff is entitled to the declaration he seeks, and I accordingly make a declaration in accordance with para. 1 of the prayer to the statement of claim. I should mention that, in addition to the income from Dr. Neale's trust, there is an assigned stipend of £50 a year in favour of the vicarage of Penmark. I understand that, whether he has a legal right to this assigned stipend or not, no claim is made to it, and consequently it is not to be mentioned in the declaration which I am prepared to make.

Judgment for the plaintiff on the claim and counterclaim.

Solicitors: *Gibson & Weldon*, agents for *Northcott Howell & Co.*, Cardiff (for the plaintiff); *Deacon & Co.*, agents for *Barker, Morris & Owen*, Carmarthen (for the defendants).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

E

**Re LIBERTY'S WILL TRUSTS, BLACKMORE v.
STEWART LIBERTY.**

[CHANCERY DIVISION (Clauson, J.), **January 15, 1937.**]

A *Settlement—Protected life interest—Forfeiture—Rentcharge to secure instalments in respect of improvements—Some improvements not within Settled Land Act, 1925 (c. 18), Sched. III, Part 2—Settled Land Act, 1925 (c. 18) s. 85.,*

L., who was entitled to a protected life interest under a settlement, executed certain improvements to the principal mansion house, and for the replacement of the capital expenditure executed a deed creating a rentcharge in favour of the trustees. The trustees at first thought that the improvements were all such that the cost could properly be paid out of capital moneys in their hands, provided repayment was secured by a rentcharge executed in accordance with the provisions of the Settled Land Act, 1925, s. 85 (1). They discovered later that some of the improvements were not such that their cost could be met in this way. The question was then raised whether, by the execution of the rentcharge, the tenant for life had charged his protected life interest so as to cause forfeiture thereof:—

C **HELD :** the rentcharge was not a charge on the equitable life interest of the tenant for life, and there was therefore no forfeiture.

[EDITORIAL NOTE. The charge under Settled Land Act, 1925, s. 85 (1), is upon the settled land and not upon the equitable life interest of the tenant for life, and therefore no event has happened to determine the primary trust of the protected life interest.

D **FOR PROTECTED LIFE INTERESTS,** see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 570-572, para. 1022 ; and **FOR CASES,** see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.]

E **ADJOURNED SUMMONS** to determine the question whether the trust, contained in the will, dated Nov. 19, 1915, of Sir Arthur Lasenby Liberty, for permitting the defendant Ivor Stewart Liberty to remain in receipt of the rents and profits of the freehold hereditaments thereby settled, ceased upon the execution of a deed dated Jan. 19, 1935, and made between the said defendant of the one part and the then trustees of the settlement on the other part.

F Under the will and codicils, dated respectively Mar. 25, 1916, and Aug. 17, 1916, of the testator, the defendant Ivor Stewart Liberty was entitled to a protected life interest in the property thereby settled, and, in 1934, he carried out certain works at Lee Manor, the principal mansion house on the said estates. The trustees, being of opinion that certain of the said works were improvements authorised by the Settled Land Act, 1925, agreed that the cost of such works, amounting in all to £1,538, should be discharged by the trustees out of capital moneys in their hands, and that the repayment thereof to them should be secured by a deed executed in accordance with the provisions of the Settled Land Act, 1925, s. 85 (1). The above-mentioned deed of Jan. 19, 1935, was accordingly executed by the defendant and the trustees, creating a yearly rentcharge out of the settled land in favour

of the trustees in accordance with the said section. Subsequently, the trustees formed the opinion that all the works in respect of the cost of which the said rentcharge was created were not improvements authorised by the Settled Land Act, there being no such extension of the Settled Land powers under the will of the testator, and the doubt was raised whether the above-mentioned deed thereby ceased to be protected by the settlement, with the result that it created a forfeiture of the protected life interest. A

Settled Land Act, 1925, s. 85, provides as follows :

(1) When the tenant for life is required by the trustees to repay by instalments the capital money expended, or any part thereof, the tenant for life is by this section authorised to create out of the settled land, or any part thereof, a yearly rentcharge in favour of the trustees of the settlement sufficient in amount to discharge the said half-yearly instalments. B

(3) A rentcharge created by or under this section shall not be redeemed out of capital money, but may be overreached in like manner as if the same were limited by the settlement, and shall cease if and when the land affected by the improvement ceases to be settled or is sold or exchanged, but if part of the land so affected remains subject to the settlement the rentcharge shall remain in force in regard to the settled land. C

D. Ll. Jenkins for the plaintiffs, the present trustees of the settlement.

J. H. Stamp for the first three defendants, the tenant for life and the persons of full age who were interested under the discretionary trusts on the determination of the equitable life interest of the tenant for life. D

H. S. G. Buckmaster for the last defendants, who were infants similarly interested.

CLAUSON, J. : The summons in this case asks that it may be determined whether or not the trust in the will of Sir Arthur Lasenby Liberty for permitting the defendant Ivor Stewart Liberty to remain in possession or receipt of the rents and profits of the freehold hereditaments thereby settled, ceased upon the execution of the deed dated Jan. 19, 1935, and made between the defendant Ivor Stewart Liberty of the one part and the plaintiff, Harold Close Blackmore and Early Christopher Francis of the other part. E

The will, for this purpose, is a perfectly simple will, by which certain freeholds are to be sold, and the usual trusts for a tenant for life and various persons in succession are made ; but what is not so usual is that it contains a clause which cuts down the tenant for life's interest to what is commonly known as a protected life interest. The clause is in these terms : F

Upon trust that if at the time of this present trust taking effect in possession no act or event shall have happened whether before or after my decease whereby the equitable life interest hereby given to my nephew Ivor Stewart Liberty in the said freeholds or any part thereof if belonging to him absolutely would have become vested in or charged in favour of some other person or persons or a corporation then my trustees shall permit my said nephew to enter into and remain in the possession and receipt of the rents and profits of the said freeholds (including the profits H

of timber cut in a due and proper course of management and of mines, minerals quarries and brickfields) during his life or until some act or event as aforesaid shall happen provided nevertheless that my trustees shall not be liable or responsible for allowing the said Ivor Stewart Liberty to remain in possession or receipt of the rents and profits of the said freeholds after failure or determination in his lifetime of the trust hereinbefore contained in his favour unless or until my trustees shall have received express notice of some such act or event as aforesaid.

- A Now, it is suggested, in view of the facts which I am next going to mention, that an event has happened whereby the equitable life interest given by the will to Ivor Stewart Liberty has become vested in, or charged in favour of, some other person. What has happened is this. Certain
- B improvements were made, and, taking the view that these improvements were improvements which the tenant for life was, by the settlement, authorised to make, the trustees thought it proper to allow the improvements to be paid for out of capital moneys, on such terms as are provided for by the relevant section of the Act, i.e., that the capital
- C money should be replaced as capital money by the tenant for life of the property, creating out of the settled property a yearly rentcharge in favour of the trustees. This is under the Settled Land Act, 1925, s. 85.

- But it is now suggested that there has been spent in making improvements a larger amount of capital money than is authorised by the Act,
- D because some portion of the improvements are not improvements included in the Settled Land Act, 1925, Sched. III, Part 2. If that be so, it is conceivable that, at some time or another, someone may have some claim upon the trustees in respect of some money which they have improperly allowed to go out of capital. But the fact remains that they
- E have in fact advanced certain capital in respect of which the tenant for life has been required to execute a document which creates, under sect. 85, a yearly rentcharge. Let me assume that £500 has been raised out of the settled land and spent on improvements. £400 has been properly raised, and spent on improvements, and the other £100 has not. A rent-
- F charge has been created of £X to replace £500. It may be that it was only right to execute a rentcharge of four-fifths of £X to replace £400, and that it was wrong that a rentcharge should be created so large as to replace the whole £500. If that is so, someone, some day or other, may claim that there will be properly payable under the rentcharge, not
- G £X, but four-fifths of £X. When that position is raised, it will be said that the tenant for life has created a rentcharge for a larger sum than he was entitled to create, and which may be in part ineffective. There can be little doubt that, if the sum paid out of capital was a proper sum and could be justified under the Act, and the right rentcharge was
- H created, it would be quite impossible to suggest that, by creating this rentcharge, which he has created under a statutory power, the tenant for life has done something, the result of which is to vest in, or charge in favour of, some other person his equitable life interest. It does nothing of the kind. It is true that the creation of the rentcharge has

had the effect of diminishing the value of something in which he has an equitable life interest. But that is quite a different thing from vesting in the Settled Land Act trustees, or charging in their favour, his equitable life interest. It has done nothing of the sort. It has never been suggested, in a case where there is no question that the amount raised A out of capital is a proper amount, that it would have any such effect. But suppose the amount raised was only partly authorised, and the rentcharge should have been less. The only effect will be that, in so far as the Act did not authorise, in the circumstances, the creation of so large a rentcharge as has been created, the document will be effective B only to create some smaller rentcharge. I cannot conceive how that can be treated as amounting to anything which vests in, or charges to, the trustees any part of the tenant for life's equitable estate. It is quite true that he is undertaking that, while he is tenant for life, he will see that the rentcharge is paid. But that does not vest anything in C the trustees, or charge anything in favour of the trustees. In my view, it is reasonably clear that the trust in the said will contained for permitting the defendant Ivor Stewart Liberty to remain in possession or receipt of the rents and profits of the freehold hereditaments thereby settled, did not cease upon the execution of the deed dated Jan. 19, 1935. D

Declaration that the trust in the said will contained for permitting the defendant Ivor Stewart Liberty to remain in possession or receipt of the rents and profits of the freehold hereditaments thereby settled did not cease upon the execution of the deed dated Jan. 19, 1935. Reference to the taxing master to tax the costs of the plaintiffs and defendants of this application E as between solicitor and client. Plaintiffs to retain and pay the said costs so taxed out of the capital moneys in their hands.

Solicitors: *Ranger, Burton & Frost* (for all parties).

[Reported by C. M. YOUNG, *Barrister-at-Law.*]

F

MIDDLESEX COUNTY VALUATION COMMITTEE v.
WEST MIDDLESEX ASSESSMENT AREA ASSESSMENT
COMMITTEE.

A [COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
January 22, 1937.]

Rates and rating—Assessment committee meetings—Right of exclusion—County valuation committee officer—Rating and Valuation Act, 1925 (c. 90), ss. 17, 18.

B The county valuation committee for the county of Middlesex directed its county valuation officer or some responsible person representing him, to attend the meetings of the assessment committee for the West Middlesex assessment area for the purposes of informing himself of what took place at those meetings, tendering information or advice, and otherwise taking part in the proceedings. The assessment committee objected to the attendance of any such person, and claimed the right to exclude him. Both bodies are constituted by the Rating and Valuation Act, 1925, which regulates their duties and obligations :—

C HELD : upon a proper construction of the Rating and Valuation Act, 1925, the valuation committee has a right to send its valuation officer or other responsible person to attend the meetings of the assessment committee, but the valuation officer cannot be made a member of the assessment committee and cannot participate in the decisions of that committee. The valuation committee and its officer must conform with all requirements contained in the Act with regard to notices where it is desired to oppose or otherwise take part in any proceedings before the committee.

D *Decision of FARWELL, J. ([1936] 2 All E.R. 1141), affirmed. R. v. Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd. (1) considered.*

E [EDITORIAL NOTE. The Rating and Valuation Act, 1925, imposes upon the county valuation committee the duty of securing uniformity in the valuation of property in the different rating areas in the county. The proper performance of this duty would not be possible if the valuation committee could only inform itself by reference to the valuation lists and reports of cases heard by the assessment committee. It is necessary that an officer of the valuation committee should be present at the meetings, so that the details and basis of the valuations should be known and proper comparison made with the methods and calculations of other assessment committees within the county. The right of the valuation committee to be present and take part in the meetings of the assessment committee is here confirmed by the Court of Appeal ; but it is to be noted that the valuation officer has no right to participate in the decisions of the assessment committee. The decision herein confirms what has been the general practice throughout the country for some time past and deals with a slight misapprehension of the decision in the case of *R. v. Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F.W.) & Co., Ltd. (1)*.

G AS TO COUNTY VALUATION COMMITTEES, see HALSBURY, Supp., Rates and Rating, paras. 86, 87 ; and FOR CASES, see DIGEST, Supp., Rates and Rating, Nos. 1161a-1168a. FOR THE RATING AND VALUATION ACT, 1925, ss. 17, 18, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 641-644.]

H Cases referred to :

(1) *R. v. Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.*, [1933] 1 K.B. 776 ; Digest Supp.

(2) *Purcell v. Sowler* (1877), 2 C.P.D. 215; 32 Digest 146, 1764.

(3) *Tenby Corpn. v. Mason*, [1908] 1 Ch. 457; 33 Digest 61, 370.

(4) *Coulsdon & Purley Urban District Council v. Surrey County Council*, [1934] Ch. 694; Digest Supp.

APPEAL from a judgment delivered by FARWELL, J., on July 16, 1936, on a motion for an interlocutory injunction treated by consent as the trial of the action. The facts, and the judgment of FARWELL, J., are fully set out in the report of those proceedings, [1936] 2 All E.R. 1141. A

A. S. Comyns Carr, K.C., and *J. Scott Henderson* for the appellant committee. B

W. E. Tyldesley Jones, K.C., and *Michael E. Rowe* for the respondent committee.

Comyns Carr, K.C.: The assessment committee has the right to regulate its own proceedings: sect. 17 (1). The county valuation committee must therefore point to a provision of law which entitles its representative to be present, even though the assessment committee objects to his presence. The respondent committee's contention that sect. 18 (2) entitles it, by a representative, to attend, and keep a watch on the proceedings of the assessment committee, is entirely foreign to the scheme laid down in those sections. C D

LORD WRIGHT, M.R.: Its purpose is, presumably, not to prevent the assessment committee from going wrong, but to help it to avoid going wrong.

Comyns Carr, K.C.: Only sect. 18 (3) gives the respondent committee power to interfere, and then only in certain limited cases. The respondent committee, or its agent, can take part in the proceedings only if he is the proposer. By sect. 37 (3), (4), the only person who can object to the proposal is one who has given notice of "such objection," and nobody can give notice of "such objection" except the person who is entitled to be served with a copy of it. The county valuation committee is not so entitled. At the hearing of a proposal, therefore, it has no right to be present, or to take any part in the proceedings at all, unless it is the proposer. The hearing of an objection is governed by sects. 18 (3) and 27 (1), but, whatever may be the precise meaning of these sections, they confer specific rights subject to specific limitations. The respondent committee cannot spell out of it a general power to take part in the proceedings whenever it pleases. If Parliament had intended to confer that power, it would have been unnecessary to mention specific occasions. The appellant committee has the right to ask the respondent committee, before allowing it to be present, whether and how it intends to take part in the proceedings, and to exclude it if it merely wishes to be present as a spectator. The declaration ordered by the learned judge would still leave open the question of whether, having admitted the E F G H

- respondent committee's agent, the appellant committee would be entitled to refuse him audience. Sect. 40 (6) gives the county valuation committee a specific right to call upon the assessment committee for information. It is not permissible to infer similar rights from the wording of another
- A section, which does not grant them in specific terms. Admittedly, the headnote in *R. v. Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.* (1) is too wide in stating that the county valuation officer is disqualified from being present at the committee "while it is hearing the proposal." In that case, the
- B proceedings of the assessment committee were invalidated by the presence of the county officer during the committee's deliberations. If he is entitled to be present for the purpose of collecting information, there seems no reason why he should not continue to be present for that purpose during the committee's deliberations. That is the time when
- C he would most desire to be present, if the justification for his presence is the obtaining of information. That case illustrates how undesirable it is that the county valuation officer, without making himself a party to the proceedings, should be present, either to obtain information about the affairs of the ratepayers, or to influence the decisions of the
- D assessment committee.

Henderson, following for the appellant committee: The implications of the order allowing the respondent committee to be present affect the independence and responsibility of assessment committees throughout the country. The words of sect. 18 (2) give the county valuation committee no powers which are not specifically given elsewhere in the Act. The general power to be present would include a power to supervise not only the assessment committee, but also the rating authority, a power which Parliament would not give by general words. A local authority may sit in private: *Purcell v. Sowler* (2); *Tenby Corpn. v. Mason* (3). Parliament could not have intended to take away that right by general words.

- Tyldesley Jones, K.C.*: It has been the practice, in nearly all counties, for the county valuation officer to attend meetings of the assessment committees. This is the only way in which the valuation committee
- G of a county can properly carry out its duties under the Act. The county valuation committees were set up to guard against the evils which had grown up, of deliberate under-assessment by the existing assessment committees, and to ensure uniformity. They cannot assist the assessment committees to perform their functions properly without being
- H represented at their meetings, and may be present while the rating authority is drawing up the draft list: *Coulsdon & Purley Urban District Council v. Surrey County Council* (4). They may, and must, express their opinion before the draft list is completed, and require the rating authority to consider it.

GREENE, L.J. : Does sect. 18 (2) give the county committee the right to examine the files of the assessment committee ?

Tyldesley Jones, K.C. : Yes, if it could not otherwise perform its duties.

GREENE, L.J. : The county committee has the duty of assisting the assessment committee to perform its functions. Is it to assist the assessment committee to perform the function of deciding on an objection ?

Tyldesley Jones, K.C. : Only to the extent of submitting points for consideration, as an advocate submits them at the Bar. He should not be present at the assessment committee's deliberations, because the decision must be that of the assessment committee.

It is unreasonable for the assessment committee to require the county valuation officer, as in this case, to state, before the hearing, which side he is taking. He cannot ascertain the facts from the form of objection, which is drawn up in very general terms, and gives very little information, but only by hearing them led before the assessment committee. Notice of objection need not be served on the county valuation committee, and therefore, if its officer were not present, objections might be disposed of without its knowledge. It may, however, require notice, under sect. 40 (3), which enables it generally to demand information it may require. By means of that notice, its officer attends meetings, gives assistance where he can, answers questions, and decides whether the county committee ought later to take part in the proceedings. Without this power to be represented at meetings of the assessment committee, the county valuation committee could not properly discharge its functions under sect. 18 (2).

Comyns Carr, K.C., in reply.

LORD WRIGHT, M.R. : This is an appeal from a judgment of FARWELL, J., and I will say at once that the question before the court is that which is defined in the writ, and nothing more. I say that because there are one or two observations of FARWELL, J., which might be construed as dealing with wider aspects, though, reading the judgment as a whole, I do not think that construction would be a fair one. It may be that, in the course of the argument before him, the contentions strayed beyond the precise question that had to be decided. I should say that that is inevitable, but, so far as I am concerned, the only question I intend to direct my mind to is whether the plaintiff committee is entitled to the declaration which it asks, and which in terms has been granted to it by the learned judge. There is, I think, no difference between the declaration asked for and that which is ordered. The writ asks for :

(1) A declaration that the plaintiff committee by its county valuation officer or other its duly authorised representative [which I suppose includes his deputies or assistants] is entitled to attend meetings of the defendant committee during

the hearing of all objections to draft valuation lists and all proposals to amend current valuation lists.

There is no declaration asked for upon any wider question, such, for instance, as whether, under that declaration, the county valuation officer, or the other representatives of the county valuation committee, would be entitled to take any part in the proceedings, if they were admitted, except in so far as they are acting under the various specific provisions of the Act, to which I may briefly advert, though I have no intention of seeking to construe the somewhat complicated interlocking provisions which deal with the powers of the county valuation committee to appear as a party, and so forth. These questions are entirely outside the ambit of those proceedings. Put very briefly, the contest between the two parties is this: Under the Rating and Valuation Act, 1925, s. 18 (2), we have these words:

It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act,

that is, Part II, which deals with valuation. It is argued that these general powers and duties impose, at any rate, a power, or a right, upon the part of the county valuation officer to be present during the proceedings of the committee, subject to the various limitations, which I shall refer to in a moment. Against that, it is said that, under the Sched. I, para. 1, the assessment committee has a general right or discretion to regulate its proceedings, and that that would include the power or discretion to exclude the county valuation committee's officer. The answer to that is that that power is subject to the provisions of this Act, and if, therefore, we find, within the ambit of sect. 18 (2), that the county valuation officer has a right to be present at the meetings of the committee, then the power to regulate the proceedings would not include, and cannot include, a power to exclude him and prevent him from exercising that right. What powers or functions may attach to the assessment committee under Sched. I, para. 1, it is not necessary, as I have already said, to consider here, beyond the matter which is expressly before the court.

The county assessment committee is the assessment committee for the area; there are many assessment areas in every county, I suppose; the county assessment committee is a body appointed under sect. 16 of the Act:

(1) Subject to the provisions of this part of this Act county boroughs and such other areas as may be constituted by schemes made under this section shall be assessment areas for the purposes of this part of this Act.

Sect. 17 provides that there shall be an assessment committee for every assessment area to discuss further the constitution of the area. That section deals with the assessment committees, and also provides that

the assessment committee for an assessment area shall be appointed as soon as may be after the passing of this Act, and as from the appointed day shall exercise such powers and perform such duties as are conferred on it by this Act, and the old assessment committees are to cease to exist. Then, if it is a county borough :

(3) In the case of an assessment area being a county borough, the assessment committee shall consist of such number of persons to be appointed by the council of the borough as may be determined by the council—

and of the persons to be so appointed not less than one-quarter shall be persons appointed to represent the boards of guardians. That, of course, is no longer the law, because the boards of guardians have been abolished. Then in sect. 18 (1)—I need not further refer to sect. 17—there is a provision for the establishment in every county of :

a committee of the county council (to be called " the county valuation committee ") consisting of such number of persons, being members of the council of the county, as the council may think fit to appoint and of a representative of the assessment committee for each assessment area which, or any part of which, is comprised in the area of the county to be nominated by the assessment committee.

It is at once obvious that the county valuation committee is a body which covers a wider area than any of the assessment committee areas, and the whole purpose of having the county valuation committee, as is stated in sect. 18 (2) of the Act, is as shown by the definition of its duty :

It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act,

and then it goes on :

and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference.

Now, the words which are relied upon as giving this right to the county valuation committee by its appropriate officer to be present at the meetings of the assessment committee are the general words defining the duty to take such steps as it thinks fit to promote uniformity in the principles and practice of valuation, and to assist rating authorities and assessment committees in the performance of their functions. That is to say, the county valuation committee's duty is to see that there is not a disuniformity as between one assessment area and another, and to see that there is not an unfair distribution of the burden of taxation over the different parts of a county, and it is the county authority having these duties in respect of the various more local committees, who do the work of assessment in each assessment area.

Now, the argument which is put forward, and which has found favour with the learned judge, is that it is necessary, for the performance of that duty, that the valuation committee should have knowledge of the proceedings which take place before the various assessment committees.

A It has certain express powers given to it in the way of seeking information and obtaining information. I need, I think, refer only to one or two of those powers. Under sect. 40 (6) there is a very comprehensive provision :

B Every assessment committee and every rating authority shall furnish to the county valuation committee all information which the county valuation committee may require for the due discharge of their functions under this part of this Act [still Part II, which deals with valuation]-and which it is in the power of the assessment committee or the rating authority to furnish.

C That is a very wide power, and it gives the county valuation committee the right, for instance, to have notice of intended meetings, and to have copies of various notices of objections, or proposals, or matters of that sort, which will come before the county's various assessment committees. That is one provision which shows the scope of its duties, and the material which it may seek from the assessment committee in order to discharge these duties. Under sect. 38 it is entitled to employ valuers who have power to enter on, survey, and value any hereditament in the area of the authority or committee, subject to certain requirements as to notice or authorisation. Under sect. 55 it has the power to appoint various officers, including valuation officers, as it may think fit.

I refer to these express powers as showing the scope of its duty, but it seems to me that the respondent committee here is right in its contention that the wide words imposing upon it the duty to take such steps as it thinks fit for promoting uniformity in the principles and practice of valuation and so forth necessarily carry with them the right which it conceives, because I agree with the argument of the respondent committee that, unless it is able to be present and hear what goes on at the meetings of the assessment committee, it will be seriously prejudiced in its task of promoting uniformity in the principles and practice of valuation. The respondent committee says it is essential for it that it should hear what is done in respect of particular cases which come before the assessment committee, that it is necessary for it to know how valuations and assessments are being dealt with, and what decisions are being arrived at, and that it can do so fairly and properly only by being present at these proceedings.

Now, there are, of course, certain limitations to be borne in mind ; for instance, it is not contended, and could not successfully be contended, H that, however wide the power of being present, which is the power given by sect. 18 (2), that power extends to its being present at the deliberations of the committee when it is arriving at a decision. That that is so—and it would scarcely fall for a decision—appears in the case of *R. v. Surrey County Assessment Committee, North-Eastern Assessment*

Area, Ex p. Woolworth (F. W.) & Co., Ltd. (1), where it was held by the divisional court that the county valuation officer was not entitled to be present when the assessment committee was considering its decision. That was the whole scope of the decision, though for some reason the reporter in the headnote has stated the effect of the case much too widely, because he has stated the effect of the decision as being that the county valuation officer : A

is disqualified from being present with the committee while they are hearing the proposal or considering their decision.

The words " while they are hearing the proposal or " have no justification whatever in the judgment, and should be struck out. I am not sure that the words " being present with the committee " are very apt, but I think they sufficiently indicate the scope of the decision. I need scarcely point out that a question of that sort is entirely different from the question which is raised by this declaration. The decision which the assessment committee is arriving at is the decision of the committee itself. The county valuation committee has nothing whatever to do with the formulation of the decision, which is purely the function of the assessment committee itself as a judicial body, and it would be most improper, on general principles of law, that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision. That case therefore throws no light upon the matter to be decided here, because the appellant committee is not asking for any such right. B C D

There is another matter which has been referred to a great deal in the course of the arguments here, and that is a matter dealing with the various provisions of the Act which give specific, and, as I think, quite separate, powers to the county valuation committee to take an active part in the proceedings, to act as a partisan, or to take sides in the proceedings of the committee, when dealing with the particular questions of valuation. In sect. 18 (3) it is provided that : E F

A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act [that is, Part II again] provided that the committee shall not be entitled so to appear in opposition to any objection made or appeal brought by the occupier of the hereditament affected unless not less than 3 days before the date of the hearing of the objection or, in the case of an appeal, such longer period as may be required by the rules relating to appeals, the committee have given notice in writing to the occupier stating their intention so to appear and the grounds of their opposition or the representations which they propose to make at the hearing. G

That proviso obviously refers only to opposition, and I am not concerned here to define the exact scope of those powers of appearing as a party, which I think means as an active party or a partisan. That power, I think, is entirely different from the general power, which, in my opinion, is implied from the words I have already read from subsect. (2) of the H

same section. There are other similar provisions in the Act. For instance, in sects. 26 and 27, there are provisions for the procedure in regard to objections to the draft valuation lists. I need not here pursue the matter in regard to that draft valuation list, but in sects. 26 and 27 certain
 A rights of taking part in these proceedings are given to the county valuation committee. Sect. 26 (1) says :

Any person (including the county valuation committee and any local authority) aggrieved by the incorrectness or unfairness of any matter in the draft list . . . may . . . lodge an objection with the assessment committee at any time.

B That gives the county valuation committee, under those circumstances, a specific power of intervening as a party. Then sect. 27 (1) provides :

C The assessment committee shall hold meetings for considering any objections made to the draft list in accordance with the provisions of this part of this Act, and on the consideration of any objection the objector, the rating authority, the county valuation committee, and the occupier of the hereditament to which the objection relates shall be entitled to appear and to be heard, and to examine any witness before the assessment committee and to call witnesses.

The words “to appear” there, I think, take their colour from the
 D following words, and show clearly that what is being dealt with there is a specific right to take an active part in the contest, and to exercise all such rights as a party litigant (if I may inaccurately describe the position in that way only to indicate the function which the committee seems to be exercising if it acts under that section) would ordinarily
 E be entitled to take. Then there is a provision as to notice. All these provisions must be fulfilled if the committee is to claim to exercise the specific rights so given. I may say two things under sect. 27. One is that it does appear that those provisions further support the view I have formed that the committee has a general right of being present,
 F because it does appear to me that the words “entitled to appear” are not limited to the outset of the proceedings, but it may be that a county valuation committee by its appropriate officer, being present at the proceedings, may be minded in the course of the proceedings to exercise his right to appear so long as he has fulfilled the appropriate conditions
 G as to notices, if and when any such conditions apply. I notice also that conditions as to notice may be waived by the persons concerned. These provisions deal with the question of objections to the draft list. The question of what I call proposals, that is to say, proposals made for the alteration or amendment during the period in which a list is current,
 H is separately dealt with under sect. 37. This contains detailed provisions, and I need not refer to it. I will merely repeat what I said in regard to the sections I have just been discussing, that the county valuation committee is given there a specific power to appear and take an active part in the proceedings, and there are certain conditions as to notice,

and so forth, and limitations as to the cases in which such appearance can be made, which have to be observed. I refer to those provisions only in order to distinguish them from what I regard as the general implied power, under sect. 18 (2), which I think, as I have already said, includes the power to be present and to prevent the assessment committee from excluding the county valuation officer from those proceedings. A

I think, therefore, the learned judge was right in making the declaration which he did, and that the appeal should be dismissed with costs. B

ROMER, L.J. : The steps that may be taken by a county valuation committee for the purpose of carrying out the duty imposed upon it by sect. 18 (2) of the Act, must, of course, be steps that do not infringe any general principle of law. No one, of course, could for a moment suggest that, for the purpose of obtaining information, a valuation officer could burglariously enter the house of the chairman of the assessment committee. Consistently with that view, it was held by the divisional court, in the case to which LORD WRIGHT, M.R., has referred, that the valuation officer was not entitled to be present with the committee when it was considering its decision on an objection or proposal. The presence of the valuation officer with the committee on such an occasion would infringe one of the fundamental principles of law relating to the administration of justice in this country. But I know of no general principle of law which could possibly be infringed by the mere presence of the valuation officer at the meetings of the assessment committee when dealing either with an objection or with a proposal. In my opinion, power to attend such meetings is one of the powers conferred upon county valuation committees by sect. 18 (2) of the Act. That being so, it is not possible for the assessment committee to exclude an officer, properly appointed for the purpose, of the valuation committee from one of those meetings, on the plea of exercising the power conferred upon it by the first schedule to the Act, of regulating its proceedings. The powers so given to the assessment committee of regulating its proceedings are in terms conferred subject to the provisions of this Act. C D E F G

I will only add this : sect. 18 (2) does not impose upon an assessment committee, or, for that matter, on anybody else in the valuation committee, the obligation to perform any positive act, but it does impose upon the assessment committee, in my judgment, the obligation not to do any act which would interfere with the proper exercise by the valuation committee of the powers conferred upon that committee. FARWELL, J., therefore, in my opinion, properly made the declaration asked for, and would properly have granted an injunction to restrain the defendant committee from interfering with the plaintiff committee H

in the exercise of that power to which I have referred, had the injunction been asked for.

I agree that this appeal fails, and must be dismissed with costs.

A GREENE, L.J. : I agree.

Appeal dismissed, with costs. Leave to appeal to the House of Lords refused.

Solicitors : *H. G. Greenwood* (for the appellant committee) ; *C. W. Radcliffe* (for the respondent committee).

B [Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

LINCOLNSHIRE SUGAR CO., LTD. (in Liquidation) v.
SMART (H.M. INSPECTOR OF TAXES).

C [HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Roche), **October 27, 29, 1936, January 21, 1937.**

D *Income Tax—Subsidy received by sugar manufacturers from Government—Whether amount of subsidy liable to income tax—Trade receipt—"Advances"—British Sugar (Subsidy) Act, 1925 (c. 12)—British Sugar Industry (Assistance) Act, 1931 (c. 35).*

E For a period of ten years from Oct. 1, 1924, a subsidy was payable by the Government to sugar manufacturers in Great Britain under and in terms of the British Sugar (Subsidy) Act, 1925. The appellant company received this subsidy, and the sums so received were dealt with by the company, in computing its profits for income tax purposes, as trading receipts. By the year 1930, there was a heavy fall in the price which recipients of the subsidy could get for their sugar, and, in accordance with the scheme, the rate of subsidy after Sept., 1931, was reduced to one-third of the rate payable at the beginning of the ten-year period, with the result that the manufacturers in 1931 were faced with difficulties, if they were to continue to pay the sugar-beet growers the prices for such beet contracted to be paid under the scheme of the 1925 Act. To assist the manufacturers, the British Sugar Industry (Assistance) Act, 1931, provided for advances by the Government for one year from Oct. 1, 1931, subject to a fixed price being paid to the beet sugar growers, and the advances became repayable in the event of imported sugar rising to a certain price, or in the event of a winding up of the company, or if debenture holders entered into possession, or if a receiver or manager of the company's business was appointed. Between Oct. 18, 1931, and Jan. 3, 1932, the appellant company received weekly advances under the Act of 1931 amounting to £17,494 5s. 7d., which sum was included as a liability in its balance sheets for the years ending Mar. 31, 1932, 1933, and 1934, respectively, but in the events which happened no part of the said sum became repayable under the Act of 1931, and the position remained unaltered at the end of the ten-year period on Oct. 1, 1934. Assessments to income tax on the appellant company were made to include the said sum of £17,494 5s. 7d., on the basis that the same was a trading receipt of the company's year ending Mar. 31, 1932. The company contended that the advances were not trading receipts, and, alternatively, claimed that, if the advances were trading

receipts, they could not be brought into account as such, so long as they remained subject to repayment :—

HELD : as the payments in question were made to the company in order that the money might be used in its business, they were supplementary trade receipts properly taken into computation in determining the amount of the company's profits for the year in which they were received.

A

[EDITORIAL NOTE.] The question here is whether a subsidy is a trade receipt within the Income Tax Act, 1918. The main difficulty turned upon the fact that these subsidies were in certain circumstances repayable and that their repayment might be considered a contingent liability of the company. The judgment contains an interesting discussion of how far the word "advance" in an Act of Parliament implies a loan or may be construed as the prepayment of a sum that will ultimately become due.

B

AS TO TRADE RECEIPTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 147-149, paras. 306-308 ; and FOR CASES, see DIGEST, Vol. 28, pp. 17-21, Nos. 87-107.]

Case referred to :

(1) *Bwlfa & Merthyr Dare Steam Collieries (1891) Ltd. v. Pontypridd Waterworks Co.*, [1903] A.C. 426 ; 11 Digest 129, 186.

C

APPEAL from an order of the Court of Appeal (LORD WRIGHT, M.R., ROMER and GREENE, L.JJ.), allowing an appeal by the respondent from an order of FINLAY, J., whereby an appeal by the respondent upon a case stated by the commissioners for the special purposes of the Income Tax Acts was dismissed and the decision of the commissioners was affirmed. The facts and the arguments are set out in the judgment of LORD MACMILLAN.

D

Raymond W. Needham, K.C., and *Roy E. Borneman* for the appellant.

E

The Solicitor-General (Sir Terence J. O'Connor, K.C.) and *Reginald P. Hills* for the respondent.

LORD ATKIN : My Lords, I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD MACMILLAN. I agree with it, and have nothing to add.

F

LORD RUSSELL OF KILLOWEN : I, too, have had that advantage, and I concur in the conclusions which my noble and learned friend has reached, and also in the grounds upon which those conclusions are based.

G

LORD MACMILLAN : I am requested by my noble and learned friend, LORD THANKERTON, to express his concurrence in the views which I have embodied in my opinion about to be read.

My Lords, during the period to which this appeal relates, the appellant company, the Lincolnshire Sugar Co., Ltd. (now in liquidation), carried on at Bardney, in Lincolnshire, the business of manufacturing sugar from beet grown in Great Britain. Between Oct. 18, 1931, and Jan. 3, 1932, the company received payment of sums amounting to £17,494 5s. 7d.

H

under the British Sugar Industry (Assistance) Act, 1931, out of moneys provided by Parliament. The question for determination is whether those sums ought to be taken into account as trade receipts in computing the balance of profits and gains of the company for the year
 A 1931/32, on which was based the assessment of its income for tax purposes for the year 1932/33 under the Income Tax Act, 1918, Sched. D, Case I.

By a previous statute entitled the British Sugar (Subsidy) Act, 1925, it was provided that, out of moneys provided by Parliament, a subsidy
 B at prescribed rates should be paid in respect of every hundredweight of sugar or molasses manufactured during a period of ten years beginning Oct. 1, 1924, from beet grown in Great Britain. It was made a condition of the payment of the subsidy that the price paid for the beet used in the manufacture should not be less than a minimum rate per ton prescribed
 C by the Act. The rate of subsidy diminished by stages during the ten years' period.

Under the Act of 1925, the company duly received payment of subsidies which were carried to the credit of its profit and loss accounts as trade receipts. These subsidies were included in the computation of
 D the company's profits and gains for income tax purposes, and it was conceded, for the purposes of the present case, that they were rightly so included.

In the year 1931, in view of the heavy fall in the price of sugar and the diminution in the rates of subsidy, further state aid was afforded to
 E certain of the companies (including the appellant company) engaged in the British sugar beet industry, which would otherwise have experienced difficulty in paying the prices contracted to be paid to the growers of the beet. This further assistance did not take the form of increasing the subsidies payable under the Act of 1925, but was provided
 F under a statutory scheme embodied in the British Sugar Industry (Assistance) Act, 1931, whereby "advances" were to be made to the named companies in respect of sugar manufactured by them from home-grown beet during the period of one year from Oct. 1, 1931.

As the question whether the payments received by the company,
 G under the Act of 1931, were or were not trade receipts depends upon the character and incidents of these payments, it is necessary to examine the relative provisions of the Act.

The title of the Act of 1931 is in marked contrast with the title of the Act of 1925. Whereas the latter is entitled :

H An Act to provide for the payment of a subsidy in respect of sugar and molasses manufactured in Great Britain. . . .

the former is entitled :

An Act to provide for the making of advances to certain companies in respect of sugar manufactured by them in Great Britain during a period of one year

beginning on Oct. 1, 1931, from beet grown in Great Britain; to provide for the recovery in certain events of the whole or some part of the advances so made, and for the remission of any balance thereof not so recovered.

The preamble recites that His Majesty's Government have :

offered to grant assistance by way of advances to the extent and subject to the conditions mentioned in this Act to such persons engaged in the manufacture in Great Britain of sugar from beet grown in Great Britain as might be prepared to accept those conditions— A

and that these conditions have been accepted by the companies specified in the first schedule to the Act (among whom is the appellant company).

Sect. 1 provides for the making of the advances. They are to be paid by the Minister of Agriculture and Fisheries out of moneys provided by Parliament. The maximum quantity of sugar in respect of which advances may be made to any one factory is fixed at 300,000 cwts., and the amount of the advance to be made in respect of each cwt. of sugar is to be calculated in the manner prescribed in the third schedule to the Act, and is in no case to exceed 1s. 3d. per cwt. It is further provided that no advance is to be made unless the Minister is satisfied that the price paid to the grower of the beet is not less than the price per ton specified in the second schedule to the Act. B C

Having thus in sect. 1 made provision for the payment of the advances, the Act proceeds in sect. 2 to make provision : D

with respect to the manner in which, and the extent to which, advances made to a company under the last preceding section shall be repayable.

First, it is enacted in subsection. (2) as follows :

Until the total amount of the advances made to any company is repaid, deductions calculated in accordance with the relevant provisions of the third schedule to this Act shall, while the market price of imported sugar is sufficiently high to bring those provisions into operation, be made from any subsidies payable to the company under the British Sugar (Subsidy) Act, 1925, in respect of sugar manufactured during the period of two years beginning on Oct. 1, 1932. E

Then in subsection. (3) it is provided as follows :

If within the period of three years commencing on Oct. 1, 1931, a winding up order is made, or a resolution for a voluntary winding up is passed, with respect to the company, or possession is duly taken of any of the company's property by or on behalf of the holders of any debentures secured by a floating charge, or a receiver or manager of the company's business is duly appointed, the total amount of the advances made to the company shall, so far as not previously repaid under the last preceding subsection, become due and payable to the Minister by the company. F G

The section concludes by providing that :

(4) Save as aforesaid, the advances shall not be repayable.

It is unnecessary to particularise the elaborate methods of calculation prescribed in the second and third schedules to the Act for arriving at the minimum price of beet and for calculating advances and deductions. It is sufficient to note that the question whether any advance is to be made to a company, and, if so, the extent of the advance is to depend H

on the current market price of sugar, and that no deduction under sect. 2 (2) is to be made from the subsidy payable under the Act of 1925, by way of repayment of advances, unless the market price of sugar exceeds a certain figure.

- A As it happens, the critical date, viz., Oct. 1, 1934, came and went without the company being called upon, under sect. 2 (2), to suffer any deductions from the subsidies received by it under the Act of 1925, presumably because the market price of sugar throughout the relevant period did not rise above the specified figure, or under sect. 2 (3) to make
B any repayment of advances, because none of the contingencies mentioned in that subsection happened in the relevant period. The payments had thus in fact become irrevocable by the time the matter came before the commissioners.

- My Lords, it is scarcely surprising that payments of so anomalous a
C character should have occasioned diversity of opinion as to the legal category to which they should properly be referred. The commissioners came to the conclusion that they :

were in their nature loans, and were not trading receipts.

- D FINLAY, J., did not think it necessary to use the word "loan," but dwelt on the feature that the payments :

were not sums paid and paid irrevocably to the company. They were not subsidies or grants to assist the company in their business ; they were sums advanced, and sums which were, in some contingencies at all events, repayable.

- E So he held that they were "rather in the nature of loans," and affirmed the decision of the commissioners. The Court of Appeal took a different view. LORD WRIGHT, M.R., was definitely of opinion that the payments :

were in their inception and in their character not loans at all, but were payments made in cash out and out, subject only to the contingent liabilities which I have indicated.

- F Both ROMER, L.J., and GREENE, L.J., were of opinion that the payments were in truth subsidies, notwithstanding the contingencies of repayment. And LORD WRIGHT, M.R., and GREENE, L.J., both emphasised the fact that before the question came to judgment the contingencies had ceased
G to operate, and the payments had become irrevocable.

- If the nature of the payments was to be determined solely by the terminology of the statute, there might be much to be said for the view adopted by the commissioners and by FINLAY, J., for the draftsman has done his best to persuade us that the payments were loans. He has
H not used that word, but he calls them "advances," and he speaks of their "recovery" in whole or in part, and of the "remission" of any balance not recovered. I agree that the word "advances" is ambiguous, and may either refer to prepayments of what will become due in future, or be a polite euphemism for loans ; but when "advances" are declared to

be "repayable" (though only conditionally), they certainly lean to the side of loans.

But, in my view, the question ought not to be decided on merely verbal arguments. What, to my mind, is decisive, is that these payments were made to the company in order that the money might be used in its business. Here I definitely part company from FINLAY, J., who thought that :

they were not subsidies or grants to assist the company in its business.

We are told, in the stated case, that it was because of an apprehension that the companies might not be able to pay to the growers of beet the prices they had contracted to pay that this further assistance was given by the Government. It is true that the appellant company apparently did not actually require to have recourse to the "advances" it received, for in its accounts for the relevant years, which have been produced, the advances are not carried into profit and loss, but are entered as liabilities, in the balance sheet, and the profit and loss accounts show a balance of trading profit without taking the "advances" into account. But, if the company had not happened to be able to pay for its raw material otherwise, it could properly have used the "advances" for this purpose. It was with the very object of enabling it to meet its trading obligations that the "advances" were made; they were intended artificially to supplement the company's trading receipts so as to enable the company to maintain its trading solvency. If the "advances" had in any year been carried to the credit of the company's trading account, as might properly have been done, and the trading account had in consequence shown a profit instead of a loss, can it be doubted that the credit balance would rightly have entered into the computation of the company's profits or gains for tax purposes? In the year with which your Lordships are concerned, namely, the year 1931/32, "advances" were received by the company, which were intended to be used, and could properly have been used, to meet the company's current trading obligations, and in that year the contingency of possible repayment did not in fact arise. In my opinion, the "advances" ought accordingly to be taken into account in computing the balance of the company's profits and gains for that year. If, in a subsequent year, down to Oct. 1, 1934, sect. 2 (2) had come into operation (as it did not), then what would have happened would have been that the company would in that year have received proportionately less subsidy, resulting in a corresponding diminution of assessable income under this head. That is to say, the "advances" would have proved, in the event, to have been, in effect, prepayments of subsidy, and so deductible from future subsidy. The contingency of repayment in the events mentioned in sect. 2 (3) does present a more difficult feature of the case, but I do not think that it called for an

estimate of that contingency being made in the year 1931/32 and debited as a contingent liability.

- A It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bullfa & Merthyr Dare Steam Collieries* (1891) *Ltd. v. Pontypridd Waterworks Co.* (1) to the effect that a court ought not to shut its eyes to the true facts if it subsequently knows them, although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view, and with what LORD WRIGHT, M.R., and GREENE, L.J., have to say on the point. But I do not find it necessary to rest my judgment on wisdom after the event. I prefer to rest it on my view of the business nature of the sums in question which the company received in 1931/32. I think that they were supplementary trade receipts, bestowed upon the company by the Government, and proper to be taken into computation in arriving at the balance of the company's profits and gains for the year in which they were received.
- D I am accordingly in favour of dismissing the appeal with costs.

LORD ROCHE : My Lords, I concur.

Appeal dismissed with costs.

- Solicitors : *Romer, Skan & Brashier* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).
- E

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

UNION TRANSPORT FINANCE, LTD. v. BALLARDIE.

[LEEDS AUTUMN ASSIZES (du Parcq, J.), **November 25, December 17, 1936.**]*Sale of Goods—Transfer of title—Disposition by seller in possession—Factors Act, 1889 (c. 45), s. 8.* A

In May, 1935, T., a branch manager of the plaintiff company, bought from C. a motor car which was then hired under a hire-purchase agreement to F., an employee of C., who was not in a position to buy a car on any terms. The whole transaction was colourable, it never being the intention that F.'s part in it should be a real one. By the agreement F. had agreed not to change the permanent garage of the vehicle, which was said to be at his mother's residence, nor to part with the possession or control of the vehicle, and F. had signed an acknowledgment of delivery of the vehicle. The vehicle in fact remained in the possession and under the control of C., who made such payments as were made to the plaintiff company. In Aug., 1935, C. hired the vehicle, under another hire-purchase agreement, to the defendant, who received the car in good faith and without notice of the previous sale by C. In an action to recover the vehicle the defendant relied on the Factors Act, 1889, s. 8:— B C

HELD: C., having sold the vehicle to the plaintiff company, continued in possession of it within the Factors Act, 1889, s. 8, and the disposition of the vehicle to the defendant, who received it in good faith and without notice of the previous sale, had the same effect as if C. had been expressly authorised by the plaintiff company to make it. The plaintiff company could not, therefore, recover the car. D

[EDITORIAL NOTE. The facts in this case are distinguished from those in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (1). In that case the goods had been sold and then taken again by the seller under a hire-purchase agreement, and it was held that the seller then became a bailee of the goods. Here the hire-purchase agreement was not with the seller but by a collusive arrangement with a third party, and the terms of the hire-purchase agreement prevented this third party being regarded as a mere nominee of the seller. Further, the sale in the present case was never completed by physical or constructive delivery to the then purchaser or to the grantee under the hire-purchase agreement. The sale referred to in this note is not, of course, that sought to be set aside in the action, but the prior sale to the grantor of the hire-purchase agreement. E F

AS TO TRANSFER OF TITLE, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 191, 192, para. 339, and see also HALSBURY, Hailsham Edn., Vol. 16, pp. 511-513, para. 755; and FOR CASES, see DIGEST, Vol. 39, p. 535, No. 1461, and Supp.] G

Cases referred to:

- (1) *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] 2 K.B. 305; Digest Supp.
- (2) *Mitchell v. Jones* (1905), 24 N.Z.L.R. 932; 39 Digest 535, case a.
- (3) *R. v. McDonald* (1885), 15 Q.B.D. 323; 3 Digest 54, 4. H

ACTION in detinue and for damages for conversion. The facts are fully set out in the judgment.

G. W. Wrangham for the plaintiff company.

M. L. Lyell for the defendant.

DU PARCQ, J.: On Aug. 9, 1935, the defendant in this action, Dr. Ballardie, took on hire from one Walter Clark, of the Manor Road Garage, Wakefield, a Wolseley saloon motor car, with the registration number BNW 920. The agreement with Clark contained an option to

A purchase the car, which was delivered to him, and remained in his possession. It is admitted that the defendant received the car in good faith, and without notice of any previous sale by Clark. The plaintiff company now claims to be entitled to the possession of the car, and brings this action against the defendant for detinue and conversion, and

B its reply to the defendant is that Clark sold the motor car to the defendant company on May 17, 1935. The facts, as I have ascertained them, are as follows. The plaintiff company, in the course of its business, buys motor cars for cash, in order to let them, under hire-purchase agreements, to would-be purchasers, who are not prepared to pay the whole purchase

C price at once. In May, 1935, the company's manager at Leeds was one Thom, who had authority to buy cars on behalf of the company, but was not permitted to enter into hire-purchase agreements without express authority in each case. Thom was on friendly terms with Clark, who had lent him money, some of which remained due, for his private needs.

D In May, 1935, Clark, who was adjudicated bankrupt early in 1936, was short of money, and he appears to have conceived a plan by which he could obtain an advance from the plaintiff company. He had in his employment a young clerk, 21 years of age, who lived with his mother, in a small house three or four miles from Wakefield, and contributed

E 32s. 6d. each week to the expenses of the household out of the £2 a week which he earned. This young man, Felton by name, had no private means at all, and was in no position to buy a car on any terms. He was, however, induced by Clark to sign a "proposal for hire-purchase" on one of the plaintiff company's printed forms. This proposed that a

F first payment of £60 should be made in cash, and the balance of the price was to be payable by 18 monthly rents of £11 2s. Clark had previously asked Thom to buy the Wolseley car on behalf of the plaintiff company, with a view to its being let out by the company on hire-purchase terms to Felton, and Thom had consented. Thom was a constant visitor to

G Clark's garage, so that he knew Felton. According to his own account, he was not greatly surprised at the suggestion that Felton should incur liability for such a substantial sum; he told me that he thought Felton might be earning as much as £4 a week. The proposal form gave Felton's age, incorrectly, as 24; accurately stated his private address; gave the

H address of his employer, Clark, as his "business address," and in answer to the question: "For what purpose will the vehicle be used?" stated "Pleasure." Felton's recollection is that he signed the proposal form in blank, and he is probably right. It is fair to him to say that I found him an honest witness. His youth and inexperience caused him to fall

in with the suggestions, the full significance of which was possibly not apparent to him. Thom appears to have had no scruples about helping Clark to carry through the transaction, although he must, I am convinced, have known that it was not genuine. He drew a cheque in Clark's favour for £180, £60 having been deducted from the £240 in respect of the first payment. He says that he did not inquire whether Felton had paid this £60; if he had questioned Felton, he would have been told that he had paid nothing. Felton, on the same day on which he signed the proposal form, signed an agreement, which was subsequently completed on behalf of the plaintiff company by its general secretary. By it, the hirer agreed not to change, without the previous consent of the owners, the permanent garage of the vehicle, which was said to be "now situate at 30, Manor Road, Ossett," where Felton lived with his mother—a house not, in fact, equipped with a garage. By the same clause of the agreement, the hirer was "not to part with the possession or control of the vehicle." The agreement was declared to be "personal to the hirer, and not assignable by him." Finally, Felton signed an "acknowledgment of delivery," acknowledging having received delivery of the vehicle. This document contains a warning in heavy type :

Important. This form is not to be signed until delivery of the vehicle has been taken and the vehicle accepted.

In fact, the whole transaction was colourable in the sense that Clark, Felton, and, as I am forced to conclude from his own admissions and the circumstances of the case, Thom, never intended that Felton should have power to deal with the car. It was never intended by any of them that the car should be delivered to Felton, either by its physical transfer to his custody, or by Clark's submitting to hold it as his bailee. On the contrary, it was intended that the car should remain, as it did remain, in the possession and under the control of Clark. Felton never used it, except on his master's business, and by his master's order. Whatever right he may have had to the possession of the car, he never sought to exercise it, and I have no doubt that it had always been understood between him and Clark, with the connivance of Thom, that he never would exercise it. To anyone unacquainted with the contents of the document to which I have referred, there was nothing to indicate any change in the ownership or possession of the car. Felton no doubt realised that he was assuming a serious liability *vis-à-vis* the plaintiff company, but Clark assured him that he would not be called upon to meet it. In fact, Clark made such payments as were made to the plaintiff company, and in Sept., 1935, arranged with the plaintiff company that notices demanding payment should be sent to him and not to Felton.

In these circumstances, the defendant says that the effect of the

Factors Act, 1889, s. 8, is to give him a good title. He relies on these material words :

A Where a person, having sold goods, continues, or is, in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

B On the facts, as I have stated them, the words of this section seem to be satisfied exactly. It was submitted, however, on behalf of the plaintiff company, that the answer to the defendant's contention is to be found in the principle applied by *MACKINNON, J.*, in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (1), following *Mitchell v. Jones* (2). I have carefully considered both these decisions. If I may say so with respect, I do not doubt the correctness of either of them, C but, in my opinion, they have no application to the facts of the present case. In *Mitchell v. Jones* (2), five judges of the Supreme Court of New Zealand held that the provisions of a section not materially different from the Factors Act, 1889, s. 8, did not apply to cases in which, the original sale having been completed by delivery, a different relation D was subsequently created between the parties to it under another contract, as where the goods were bailed or leased back to the vendor. In his judgment, *STOUT, C.J.*, said, at p. 935 :

E In this case the person who sold the goods gave up possession of them, and gave delivery of them to the buyer. The relationship therefore, of buyer and seller between them was at an end. It is true that the seller got possession of the goods again, but not as seller. He got the goods the second time as the bailee of the buyer.

WILLIAMS, J., put the point shortly, when he said, at p. 936, that the section did not " apply where a sale has been absolutely final by delivery, and possession has been abandoned by the vendee."

F In the present case, the sale to the plaintiff company was not completed by delivery, and the plaintiff company's contention derived no support from the reasoning of the learned judges. It is true that *MACKINNON, J.*, in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (1), extended the principle of the decision to a case where the original G sale was not completed by physical delivery. He based his decision on the ground that the original vendor's possession of the lorry there in question, at a time when those who were relying upon the section made their bargain with him, was not the possession of a seller who had not delivered the article sold to the buyer, but was the possession of a bailee H under a valid hire-purchase agreement made with that buyer.

Mr. Wrangham, on behalf of the plaintiff company, contends that, though the motive of *Clark, Felton, and Thom* may have been to deceive and defraud the plaintiff company, they nevertheless intended to enter into the transaction into which they purported to have entered, and he

says that, if that is so, Clark, after May 17, 1935, must have continued in possession of the car, not as a seller who had not yet delivered it to the buyer, but as the bailee of Felton, who, being entitled to possession of it, had acknowledged to the plaintiff company that he had taken delivery of it. In my opinion, the contention is unsound. If, at different stages of this transaction, the plaintiff company and Felton had a right to possession of the car, neither of them had exercised the right at the date of the delivery of the car to the defendant. It is a mistake to suppose that, because the plaintiff company had entered into a contract with Felton which gave the latter a right to possession of the car, the vendor at once became the bailee of Felton. A bailment consists in the delivery of an article upon a condition or trust : see *R. v. McDonald* (3), per LORD COLERIDGE, C.J., at p. 327. There need not be physical delivery. It is not essential that the bailor should ever have had possession independently of the possession of the bailee :

A man may become the bailee of another either by attorning to him, or by receiving a thing for him in pursuance of an undertaking to that effect.

See the contribution of Mr. R. S. Wright, afterwards WRIGHT, J., in POLLOCK AND WRIGHT'S POSSESSION IN THE COMMON LAW, 1881, p. 161. It is true that Felton had agreed with the plaintiff company that he would keep the car in his non-existent garage and would not part with the control of it, and that he had said to them, untruly as I find, that he had taken delivery of the car. It is not the fact, however, that Clark ever attorned to Felton, and Clark's conduct, as Thom, the plaintiff company's agent in the purchase of the car, well knew, was inconsistent with the view that he had attorned to him. As Clark never gave possession of the car to Felton, the plaintiff company's contention is not supported by the fact that he had, on Jan. 3, 1935, entered into an agreement with the company to "re-possess" cars let on hire-purchase terms in the event of a hirer "defaulting in payment."

Mr. Wrangham argued, alternatively, that Felton must be regarded as a mere nominee for Clark, that it followed that Clark was to be regarded as himself a party to the hire-purchase agreement, and that, therefore, his position was precisely the same as that of the vendor in the case decided by MACKINNON, J. The answer to this ingenious contention is that the facts of the case in no way support it. Whatever may be said of Felton, he was not a nominee for Clark in the sense in which Mr. Wrangham used the word. The terms of the contract preclude that possibility ; it was a contract "personal to the hirer," and the plaintiff company might well have refused to make a contract with Clark.

In my opinion, the defendant is entitled to rely on the Factors Act, 1889, s. 8, and the disposition of the car in his favour must be taken to have the same effect as if Clark had been expressly authorised by the plaintiff company to make it.

I should say that, although some evidence was given before me as to a transaction relating to the same car between Clark and another company in June, 1935, neither party sought to rely on this transaction as affecting the rights of the parties in this action. In the result, there must
A be judgment for the defendant, with costs.

Solicitors : *Peacock & Goddard*, agents for *H. E. Ward & Co.*, Chesterfield (for the plaintiff company) ; *H. Huband Harper* (for the defendant).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

B

UNITED MOTOR FINANCE CO. v. ADDISON & CO., LTD.

[PRIVY COUNCIL (Lord Roche, Sir Shadi Lal and Sir George Rankin),
November 13, 16, 17, 18, 19, December 10, 1936.]

C *Hire-purchase—Financing agreement—Misrepresentation of price by seller—Sale of used car represented as new car—Fraud.*

The plaintiff firm financed for the defendants the hire-purchase of motor cars, the purchaser of the car paying one-third of the price, and the plaintiff firm the other two-thirds, less an agreed commission. The hire-purchase agreement was then entered into between the plaintiff
D firm and the purchaser. It was a stipulation of the agreement between the plaintiff firm and the defendants that the purchaser should pay not less than one-third of the purchase price as a deposit, and in the present action fraud was alleged against the defendants by reason of the fact that they (a) in some cases had allowed a discount to the purchaser which was set off against the initial deposit, (b) in other cases had effected the same result by buying from the purchaser a used car at a price greater
E than its value, and (c) in other cases had caused the plaintiff firm to enter into such hire-purchase agreements purporting to be in respect of new cars, when they had in fact allowed the purchaser to use the car for such a period that its value was so depreciated that it was not a proper security for the balance of the purchase price :—

Held : the intention to deceive is not necessarily an intention to
F injure or to cheat, and if the defendants made to the plaintiff firm a statement as to price and deposit which they knew to be untrue, and did so with a view to the plaintiff firm entering into a purchase, there was a sufficient basis for an action of deceit, provided always that the plaintiff firm relied upon the statement. The damages could not be modified upon any assumption that the plaintiffs, had they known the facts, would have entered into some modified contract with the purchasers, and so
G have lost money in any event. In all of the three classes of misrepresentation the plaintiff was entitled to succeed.

[EDITORIAL NOTE. The principles of fraud applied in this case, founded upon the law as laid down in *Derry v. Peek* (1), are well established. The importance of the case lies in the application of those principles to a case that has in recent years become a very common transaction. The extension of the hire-purchase
H system has been in large measure due to the readiness of companies to undertake merely the financing of such agreements on behalf of the owners. The examination of the position, therefore, of the duty of the owners to supply such companies with precise and true information of the exact bargain between the owner and the hirer is of singular interest. It will be noticed that, where the financing company has agreed in effect to advance a definite proportion of the price, the owners cannot

give the purchaser a discount upon the part of the price to be paid to them—i.e., the part to be paid down or the deposit—since the payment in full of the deposit is a measure of the ability of the purchaser to meet the instalment payments. The case also considers the position arising upon the acceptance of a used car as part payment of the deposit, another very common practice at the present time.

AS TO HIRE PURCHASE AND FINANCE COMPANIES, see HALSBURY, Hailsham Edn., Vol. 16, pp. 507, 508, para. 749. A

AS TO FRAUD, see HALSBURY, Hailsham Edn., Vol. 23, pp. 42-43, para. 60 ; and FOR CASES, see DIGEST, Vol. 35, pp. 35-37, Nos. 277-299.]

Case referred to :

(1) *Derry v. Peek* (1889), 14 App. Cas. 337 ; 35 Digest 27, 185. B

APPEAL from the decision of a Division Bench varying the findings of STONE, J., at the trial of an action on the Original Side of the High Court at Madras. The facts and arguments sufficiently appear from the judgment of the Board delivered by SIR GEORGE RANKIN.

Leslie De Gruyther, K.C., and *S. P. Khambatta* for the appellants. C

A. M. Dunne, K.C., and *Sir Thomas Strangman* for the respondents.

SIR GEORGE RANKIN : The plaintiff firm sues the defendants, who are a limited company trading in Madras, for damages for fraud in connection with the sale of motor vehicles. The parties had been dealing with each other since 1924, and until 1929 the dealings gave rise to no complaint, but in respect of 40 transactions of 1929 and 1930, the present action was brought on Aug. 7, 1933, on the Original Side of the High Court at Madras. It was tried by STONE, J., in 1934, and by his decree dated May 9, 1934, he found for the plaintiff firm in respect of 25 transactions, directing an inquiry as to damages. On appeal, a Division Bench (VARADACHARIAR and BURN, JJ.) varied his findings, with the result that the plaintiff firm succeeded as to 12 items, but in respect of some of these damages were directed to be assessed on a different basis from that adopted by STONE, J. D

On this appeal to His Majesty the decision of the Division Bench was complained of in respect of 35 out of the original 40 transactions ; but, the appeal not having been pressed as to certain items, and their Lordships not having called upon the respondents in respect of certain others, 19 transactions are all that need be canvassed in this judgment. The decree of the Division Bench will stand as regards the following items : viz., 1, 2, 4, 6, 10, 18, 20, 21, 22, 23, 29, 32, 33, 34, 39, 40. In the case of items 3, 5, 8, 9 and 19 the decision of STONE, J., in favour of the defendants has not been challenged. E

The course of dealing between the parties was that the plaintiff firm acted as financiers to enable customers of the defendants to buy motor cars (or buses) on a system of hire-purchase. The defendants, being owners of a car, would agree with their customer upon a price. The customer would pay immediately one-third of the price, the insurance F

premium for a year and the cost of the stamp for the agreement in writing. The plaintiff firm would become purchasers of the car from the defendants by paying to the defendants the remaining two-thirds of the price (less an agreed commission) and would enter into a hire-purchase agreement with the customer whereby the customer, on getting delivery, undertook to pay to the plaintiff firm the amount of such two-thirds plus certain further sums ("charges") by instalments within a year.

Before May, 1929, the plaintiff firm had no representative or office in Madras; and the transactions were entered into by the plaintiff firm's Calcutta office receiving from the defendants proposal forms, invoices, letters, etc., by post, and answering the same by sending cheques, etc., in like manner. In May, 1929, however, the plaintiff firm appointed one Ponting to act for it. The exact extent of his authority is a matter of some dispute between the parties, but a main object of his appointment was to accelerate the carrying out of the transactions. Ponting would sign hire-purchase forms and authorise delivery to the defendants' customers, telegraphing to Calcutta the amount for which the plaintiff firm's cheque was required and posting the proposal forms, invoices, etc., to Calcutta.

In Dec., 1930, the plaintiff firm stopped doing business with the defendants because of the matters now complained of. From the beginning in 1924, when the arrangement between the parties for future business was made orally by Miss Thear (Mrs. Palmer) with the directors of the defendant company, it was expressly stipulated by the plaintiff firm that it would pay two-thirds of the actual price to the customer and no more, and that the customer should pay not less than one-third of that price as a condition of the transaction being entered into by the plaintiff firm at all. The fraud charged by the plaintiff, so far as their Lordships are now concerned with it, is that the defendants, by the documents forwarded to the plaintiff firm, throughout represented that these stipulations were being observed, the price being stated at a definite figure and the customer represented as having paid a deposit of a definite amount (not less than one-third of the price); whereas in certain cases the defendants: (a) had allowed a discount to the customer off the nominal price and allowed him to set it off against part of the initial deposit; (b) had effected the same result by buying from the customer a used car at a price which was greater than any estimate of its value could justify; (c) had forwarded the proposal form and other documents to the plaintiff firm after the customer had been allowed to use the vehicle for such a period that the transaction did not relate to a new car, but to a used car of depreciated value which afforded no security to the plaintiff firm in respect of the hirer's liability for the instalments.

In all the cases to which these complaints relate loss has resulted to

the plaintiff firm by reason of the fact that the hirers have failed to pay the instalments which they undertook to pay. The plaintiff firm says that it would never have entered into any of these transactions had it been told the real facts at the time. In particular, and with reference to the initial deposit by the hirer of one-third of the price, its case is that for hire-purchase transactions such a stipulation was essential in view of the heavy depreciation immediately involved when a new car is taken into use : unless a sufficient part of the price is paid on delivery of the car, a time may come when the hirer by use of the car has caused more wear than he has paid for, and when the value of the car as a used car may seem no great bargain for the instalments which have still to be paid, and be no good security therefor.

(a) That the defendants gave to their customer, the "hirer," discounts in the three transactions mentioned under this head is not disputed. The discounts allowed were on a price of Rs. 5,050, a discount of Rs. 325 ; on a price of Rs. 4,450, a discount of Rs. 302-4-0 ; on a price of Rs. 4,175, a discount of Rs. 177-12-0. In each case the discount being allowed against the initial payment resulted not only in the plaintiff firm paying more than two-thirds of the real price, but also in the hirer paying less than one-third thereof. The trial judge, being of opinion that the plaintiff firm would not have entered into the transactions but for the defendants' representations on these points, gave the plaintiff firm damages "on the basis of what the plaintiffs have lost by entering into the transactions." The Division Bench disallowed the plaintiffs' claim altogether, being of opinion that the practice of "taking trade-in cars and allowing large discounts" was known to, and winked at by, those in charge of the plaintiffs' Calcutta office, and that the defendants must have honestly believed that the initial deposit was their own concern. In their Lordships' opinion, the view taken by the trial judge was correct. The evidence does not justify the opinion of the Division Bench that the plaintiff firm's Calcutta office knew of these discounts, and the evidence given on behalf of the plaintiff firm is sufficient to establish that the plaintiffs relied on the defendants' representations as to price and as to initial deposit. Ponting's knowledge of the practice complained of is not proved, but their Lordships are of opinion that the evidence as to Ponting's duties and authority makes it impossible to impute his knowledge to the plaintiff firm. The trial judge, in their Lordships' opinion, correctly understood and applied the law as laid down in *Derry v. Peek* (1), with reference to actions for deceit. The only director of the defendant company to be called was Mr. F. G. Luker, of whom the Division Bench said that "he seems to know very little and remembers even less of the suit transactions ;" but, as *STONE, J.*, who saw him in the witness box, was of opinion that he gave his evidence very fairly and frankly and was a man of integrity, their Lordships desire to make

clear that the fraud practised on the plaintiff firm was not his work, nor did he know of it at the time. The defendants' evidence does not enable the individual responsible therefor to be specified in each case, but it is to be noted, even as regards the salesman responsible for carrying out each transaction, that in the view of STONE, J., and in their Lordships' view, the representations complained of were not made, so far as can be seen, with any intention to injure the plaintiff firm. The expectation was that each transaction would be carried out in due course, each hirer fulfilling his obligations. But, as STONE, J., rightly held, the intention to deceive is not necessarily an intention to injure or to cheat, and, if the defendants made to the plaintiff firm a statement as to price and deposit which they knew to be untrue, and did so with a view to the plaintiff firm entering into a purchase, there is a sufficient basis for an action of deceit, provided always that the plaintiff firm relied upon the statement. No doubt if it could be said that the statement made by the defendants was untrue, but that the person making it did not appreciate that it was not the truth, this would be consistent with honesty, and would ground no charge of fraud. But their Lordships cannot accept the suggestion that salesmen of motor cars would have any difficulty in appreciating the elements of falsity in the representations complained of. Nor can they modify the resulting damages on the footing that though in the absence of misrepresentation the plaintiff firm would not have made the contract with the defendants or with the hirer which it did in fact make, nevertheless even if it had known the facts it would have entered into some other contract and thus lost money in any event. It is not known, for example, whether any of the hirers could or would have paid a deposit of one-third of the real price, or what effect such payment might have had upon his subsequent action. It cannot be assumed that the plaintiff firm would have been willing to depart from its well considered terms—at all events without making special inquiry as to the hirer or asking for the defendants' guarantee.

(b) The cases in which complaint is made that by allowing an excessive price for a used car the defendants in effect gave to the hirer an allowance off the price, fall into two groups. In respect of the transactions numbered 7, 15, 27, 36 and 38 the Division Bench did not disagree with the trial judge as regards the fact that the price allowed for the used car was such as to amount to the grant of a discount upon the price of the new car. In the cases numbered 11, 12, 13, 14, 35 and 37, however, the Division Bench were not satisfied that the price allowed for the used car was more than a fair price, at least in the opinion of the defendants. Their Lordships having examined these items in detail, accept the view of the Division Bench in the case of No. 13, but in each of the other cases have arrived at the same conclusion as the trial judge. In respect, therefore, of 10 of the 11 cases coming under this heading the

plaintiffs' claim succeeds, and the measure of damages must be the same as under heading (a).

(c) The last group consists of five items. In the case of Nos. 16 and 17 STONE, J., had found for the defendants, but as regards Nos. 28, 30, 31 he had given damages :

on the basis of what the plaintiffs have lost by entering into the transactions.

The complaint here is that the defendants put forward to the plaintiff firm cars which had been for a considerable time in use as though they were new cars. The Division Bench, finding this to be the fact, held that the plaintiff firm could only be allowed damages to the extent of two-thirds of the depreciation on the value of the car. Their Lordships are of opinion that the facts in each of these five cases entitle the plaintiff firm to recover as damages whatever it has lost by reason of its entering into the transaction. The result is that as regards 18 out of the 19 cases comprised in groups (a), (b), (c) above the appeal succeeds. The plaintiff firm is entitled to damages and the measure of damages in each case is that described in the decree of STONE, J., by the words "on the basis of what the plaintiffs have lost by entering into the transaction." Their Lordships will humbly advise His Majesty accordingly.

As regards costs of the trial court the plaintiff firm should get its costs calculated on the amount ultimately to be decreed to it, but as against that should pay to the defendants one-half of the defendants' costs. The defendants, however, must pay the plaintiff firm's costs of the appeal to the Division Bench and of this appeal. There will be no order with reference to the costs of the examination of Mr. W. H. Luker on commission.

Solicitors : *T. L. Wilson & Co.* (for the appellants) ; *Sanderson, Lee & Co.* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

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R. v. RAILWAY ASSESSMENT AUTHORITY, *Ex parte* SOUTHAMPTON CORPORATION.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 21, 1937.]

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Rating—Railway Assessment Authority—Jurisdiction—Valuation roll—Estimated relative values—Adjustment—Time for objection expired—Railways (Valuation for Rating) Act, 1930 (c. 24).

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In terms of the Railways (Valuation for Rating) Act, 1930, the Railway Assessment Authority in July, 1933, settled the draft valuation roll as affecting the Southern Railway Co., and the total rateable value of the whole undertaking was shown to be £2,225,000, part of which, relating to Southampton Dock, was assessed at £101,520. After the draft roll had been settled, notice thereof was given to various persons, including the rating authority of Southampton. Thereupon the Southampton rating authority, in terms of the Act of 1930, made a representation objecting to the apportionment relating to Southampton Dock, on the ground that it was insufficient, as full regard had not been paid to all material considerations, including the net receipts derived from the hereditament, and the relative value of the land and buildings then occupied, and that it was therefore less than a fair apportionment. After considering the representation, the Railway Assessment Authority decided that effect ought not to be given to it. Meanwhile, as a result of an appeal to the Railway and Canal Commission, followed by an appeal to the House of Lords, the rateable value of the whole undertaking, being the cumulo in the draft valuation roll, had been reduced to £2,180,000, with consequential reductions in the various parts of the whole undertaking, including a reduction, as regards the Southampton Dock, from £101,520 to £100,000. On Apr. 27, 1934, the draft valuation roll was completed by the Railway Assessment Authority, in pursuance of the provisions of the third schedule of the statute, notice whereof was given by the Authority on May 1, 1934, to all interested parties, including the Southampton rating authority, and, at the same time, attention was particularly directed to the right of appeal, under sect. 9 of the Act of 1930, within two months after completion of the railway valuation roll, to the Railway and Canal Commissioners against an incorrect determination of the net annual or rateable value of any railway hereditament. The Southampton rating authority did not appeal. Later, the rateable value of the whole undertaking was reduced by the Railway and Canal Commission to £1,077,131 and the commissioners made an order under the Act, directing the Railway Assessment Authority to make the necessary adjustment, which was, on appeal, confirmed by the House of Lords, and became operative within the time limited by sect. 10 of the Act. Thereupon the Railway Assessment Authority inserted the new aggregate sum in the roll, and made proportionate deductions in the case of each constituent undertaking, and, by that time, the period for making representations under the Act had elapsed. A revision was now sought of the apportionment in respect of Southampton Dock :—

HELD : the duty of the Railway Assessment Authority was properly performed, without any excess of jurisdiction, and the Act did not provide, in the circumstances, for a reiteration of the objections made by the local rating authority without success in 1933.

[EDITORIAL NOTE.] This decision carries the matter of the procedure in the assessment for rating purposes of railway undertakings a step further. The principles were laid down in the House of Lords in the case of *Railway Assessment Authority*

v. *Southern Ry. Co.*, [1936] 1 All E.R. 26, Digest Supp., and there was later an application for revision of the assessment before the Railway and Canal Commission reported in [1936] 2 All E.R. 316. That revision could only at that stage have been granted on the ground of miscalculation. In the present proceedings it was sought to show that the assessment authority had neglected to perform its statutory duty or exceeded its jurisdiction, a form of proceeding which would be available in the case of something more than a miscalculation—in fact it was a suggestion that a wrong principle had been applied. A

AS TO THE RATING OF RAILWAYS, see HALSBURY, 1st Edn., Vol. 24, Rates and Rating, pp. 30-35, paras. 50-58; and FOR CASES, see DIGEST, Vol. 38, pp. 534-546, Nos. 796-892.] B

Case referred to :

- (1) *Stepney Borough Council v. Walker (John) & Sons, Ltd.*, [1934] A.C. 365; Digest Supp.

APPLICATION to make absolute two rules *nisi*, one for a writ of *mandamus* against the Railway Assessment Authority, commanding it to hear and determine, pursuant to the statutes in that behalf, the matter of the value of the Southampton Dock undertaking in the revised railway valuation roll relating to the Southern Railway Co.; and the other for *certiorari*, directing the removal into this court of the entries relating to the Southampton Dock undertaking in the revised railway valuation roll relating to the Southern Railway Co. The facts and the arguments are set out in the judgment of LORD HEWART, L.C.J. C
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The proceedings in the House of Lords are reported in [1936] 1 All E.R. 26, and the particular passage referred to is on pp. 39, 40, and the proceedings before the Railway and Canal Commission are reported in [1936] 2 All E.R. 316. E

Sir Stafford Cripps, K.C., and *Erskine Simes* showed cause on behalf of the Railway Assessment Authority.

R. P. Croom-Johnson, K.C., and *Harold I. Willis* in support of the rule. F

LORD HEWART, L.C.J.: These are two rules *nisi*, one for a writ of *mandamus*, the other for a writ of *certiorari*. The court is asked to issue a writ of *mandamus* to the Railway Assessment Authority :

commanding them to hear and determine pursuant to the statutes in that behalf the matter of the value of the Southampton Dock undertaking in the revised railway valuation roll relating to the Southern Railway Co. G

In the application for *certiorari*, the court is asked to grant a writ of *certiorari* :

to remove into this court the entries relating to the Southampton Dock undertaking in the revised railway valuation roll relating to the Southern Railway Co. H

In other words, the applicants are alleging, at one and the same time, that the Railway Assessment Authority, on the one hand, has neglected,

and refused to perform, its statutory duty, and, on the other hand, has usurped or exceeded its jurisdiction. Now, the law relating to this controversy and the salient facts emerging from it have been so lucidly and completely stated by Sir Stafford Cripps that it would be idle on
A my part to attempt fully to recapitulate them. It is enough, I think, to say that, under the provisions of the Railways (Valuation for Rating) Act, 1930, the Assessment Authority in July, 1933, settled what is called the draft roll relating to the Southern Railway Co. In that document, the total rateable value—that is to say, of the undertaking regarded as
B a whole—was a sum of £2,250,000, and the particular part of that whole which is constituted by the Southampton Dock was assessed at a figure of £101,520. That roll having been settled, notice of it as a draft was given to various persons, and, among others, to the rating authority in Southampton, and there followed, as the Act provided that there might
C follow, what is called a representation from the Southampton local authority complaining of the apportionment which had been made. The document is exhibited to one of the affidavits in this case. It is not necessary that I should read it, but the first paragraph states that :

D The rating authority of the county borough of Southampton hereby make to the Railway Assessment Authority a representation as hereinafter set forth, with respect to the following entries in the draft of the part of the first railway valuation roll which relates to the undertaking of the Southern Railway Co.

Then follow statements of the assessment area, the rating area, the premises, and the entries in the roll referred to, and, in the very fore-
E front of the grounds which the rating authority expresses for its dissatisfaction, appears this statement :

That the apportionment of the dock undertaking is insufficient, full regard not having been paid to all material considerations, including the net receipts derived from the hereditament and the relative value of the land and buildings now occupied

F The grounds went on to allege further :

That of the total annual value of the undertaking that portion of the Southern Railway allocated to Southampton is less than a fair apportionment, and that the total net annual value is incorrect.

G That representation having been made, it was considered by the Assessment Authority on two days, Nov. 24 and Dec. 20, 1933, and, after consideration, the Authority announced, on Feb. 7, 1934, that it was resolved that effect ought not to be given to that representation. Now, in the meantime, other events had been taking place. There had been
H an appeal to the Railway and Canal Commission, followed by a further appeal to the House of Lords, with regard to the rateable value of the undertaking regarded as a whole, and the result was that there was by order a reduction of the total sum, what is called the cumulo in the draft roll, to £2,180,000, and there were consequential reductions in the

various parts which made up the whole. Among other reductions there was, in the case of Southampton, a reduction from £101,520 to £100,000. So much for the draft roll. On Apr. 27, the Assessment Authority completed that roll in pursuance of the provisions of the third schedule to the statute, and on May 1, 1934, notice was given by the Assessment Authority to all persons interested, including the Southampton rating authority, that the roll was completed, and at the same time attention was pointedly directed to the right of appeal. Now, that is a right of appeal under the Railways (Valuation for Rating) Act, 1930, s. 9, which provides, among other things, that : A

(2) At any time within two months after the Railway Assessment Authority have completed any part of a railway valuation roll, appeals may be brought to the Railway and Canal Commissioners against that part of the roll by the persons and on the grounds hereinafter mentioned— B

and one of those grounds is : C

(b) on the ground that the Railway Assessment Authority have . . . determined incorrectly the net annual or rateable value of any railway hereditament.

It is perfectly obvious that, at that time, and by reason of those provisions, the Southampton rating authority, if it had been so minded, might have appealed. It refrained from taking that course : there was no appeal ; and so matters stood. During and after that period, the Railway Assessment Authority was naturally busied with the problem which had arisen with regard to the value of the undertaking regarded as a whole, and the Railway and Canal Commission ultimately reduced the total cumulo, the rateable value of the whole undertaking, to the sum of £1,077,131 and, having effected that reduction, the Railway and Canal Commission proceeded to make an order under the statute, not so much requesting as directing the Railway Assessment Authority to make the requisite adjustment. That order, having been made by the Railway and Canal Commission, was the subject of appeal to the House of Lords, and, in the result, that order was confirmed by the House of Lords, and it became operative within the time limited by sect. 10 of the Act. D E F

In those circumstances, what was the position of the Railway Assessment Authority ? It was bound to give effect to the order which had so been confirmed, and it was necessary to revise the figures which appeared in the roll in its earlier form. What was the problem which the Assessment Authority had to elucidate ? It is described very clearly in a document which is called the confirmation of apportionment scheme, under date Apr. 20, 1932. By cl. 6 of that scheme, it is provided that : G H

The net annual value of the undertaking of a company as a whole shall be divided among the several constituent undertakings in proportion to the estimated relative values of the several constituent undertakings to the undertaking of the company as a whole.

The paragraph goes on to reiterate the class of consideration which is to be taken into account for the purpose of arriving at that estimate. Faced with that duty, the Railway Assessment Authority inserted the new total for the whole undertaking, and proceeded, with reference to

A each one of the several constituent undertakings which formed parts of the whole, to make a proportionate deduction, so that in each case the revised figure for each constituent undertaking should bear, to the new figure for the total, the same proportion as that which was borne by the old figure for each undertaking to the old figure for the whole under-

B taking. It is common ground that, when that stage had been reached, the time for representations, as they are called in the statute, had gone by. The Assessment Authority was performing the order which it had been directed to perform. I am not going to read again the grounds upon which these rules were obtained; but what is sought here is, by

C an afterthought, and by a second mode of procedure, engrafted upon the Act, and finding as yet no place in it, to reiterate the contentions which were made, and made without success, by the representations which the Southampton rating authority put forward in Oct., 1933. The contention is not that the proportion has been varied as between the estimated

D relative values and the value of the whole. The contention is, as I understand it, that, because of what has since taken place, it becomes incumbent upon the Rating Authority, so far as Southampton Dock is concerned, to look into the intrinsic merits of the system and the method upon which a particular estimated relative value was assigned to South-

E ampton Dock. What is sauce for the Southampton authority is sauce for all the other authorities. I gather, from one of the affidavits, that there are nearly 300 authorities concerned one way or another, and some thousands of rateable hereditaments. Mr. Croom-Johnson, of course, does not shrink from the prospect, and his argument involves the proposi-

F tion that the Railway Assessment Authority might, by an order of *mandamus* from this court, be bidden to enter upon an inquiry which, in the old phrase, stretches out in the direction of the infinite. The Act of Parliament is not so framed; the Act of Parliament contemplates no such procedure, and I am satisfied, having carefully considered the facts

G in this case in relation to the sections of the Act and its schedule, that there is no ground whatever for saying that the Assessment Authority either has refused to perform its duty, or, in purporting to perform its duty, has committed any excess of jurisdiction. In my opinion, the Assessment Authority has faithfully performed its duty, without any

H excess of jurisdiction, and the observations which were made, for example, not for the first time, in the case of *Stepney Borough Council v. John Walker & Sons, Ltd.* (1), seem to me to apply.

We cannot order the Authority to do that which it has lawfully and completely done, nor can we say that, in so acting, the Authority has

usurped or exceeded its jurisdiction. I think, therefore, that these rules and each of them ought to be discharged.

SWIFT, J. : I agree, and I have nothing to add.

GODDARD, J. : I agree.

Rules discharged with costs in each instance.

Solicitors: *Torr & Co.* (for the Railway Assessment Authority);
Godden, Holme & Ward (for the Southampton Corporation).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

COLLARD v. RIVER STOUR (KENT) CATCHMENT BOARD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Macnaghten, JJ.), **December 17, 1936.**]

Sewers and Drains—Land drainage—Tidal lands—Liability to land drainage rate—Land Drainage Act, 1930 (c. 44), s. 77.

The appellant was rated under the Land Drainage Act, 1930, in respect of certain lands which were admittedly tidal lands within sect. 77 (2) of that Act. The appellant contended that the lands, being tidal lands, were exempt from rating by sect. 77 (1) (c) :—

HELD : the exemption in the Land Drainage Act, 1930, s. 77 (1) (c), did not apply to the appellant's lands.

[EDITORIAL NOTE. This case settles the question of the liability to rates under the Land Drainage Act, 1930, of tidal lands other than those vested in His Majesty. The provisions of the Act relating to this matter are here construed by the court and the matter would now seem to have been definitely settled.

AS TO DRAINAGE RATES, see HALSBURY Supp., Rates and Rating, para. 212 ; and FOR CASES, see DIGEST Supp., Sewers and Drains, Nos. 432a-469. FOR THE LAND DRAINAGE ACT, 1930, ss. 24-32 and s. 77, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, pp. 546-552, 578.]

APPEAL by way of case stated from a decision of the justices of East Kent Quarter Sessions given on June 26, 1936.

The appellant, Douglas Argles Collard, was on Nov. 21, 1935, rated and assessed by the respondent board under the Land Drainage Act, 1930, as the owner and occupier of certain property at Stodmarsh in the county of Kent, described as agricultural land, in the sum of £3 5s. in respect of owner's rate, and £2 16s. 10½d. in respect of occupier's rate. On appeal to quarter sessions it was admitted that a drainage rate had been charged on, and paid without question in respect of, the lands for many years before 1930. It was also admitted that the lands were tidal lands within the Land Drainage Act, 1930, s. 77 (2). The appellant contended that the lands, being tidal lands, were exempt from rating by the Land Drainage Act, 1930, s. 77 (1) (c). The respondent board contended that the lands were not so exempt, and that sect. 77 (1) (c) did not apply to the appellant's lands. Quarter sessions, being of opinion that the appellant's lands were not exempt from rating by the Act of

1930, dismissed the appeal against the rate, and stated a case for the opinion of the High Court.

Cyril King (*D. M. Wachter* with him) for the appellant.

Lancelot Fletcher for the respondent board.

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LORD HEWART, L.C.J. : This is a case stated by the justices for the county of Kent. The point, and the only point, it involves arises out of the construction of certain words in the Land Drainage Act, 1930, s. 77. The appellant here and at quarter sessions was the owner and occupier of certain lands, as to which it is found, as a fact, that they were tidal lands, and the contention was, and is, that, because the lands were tidal lands, they were exempted from the drainage rate. Now, that exemption from the drainage rate is said to be derived, and derived solely, from the Land Drainage Act, 1930, s. 77. It is not even suggested that, before the passing of that Act, there was any general exemption from rateability of tidal lands as such, and, that being so, it is not surprising to find that, in the case as stated at quarter sessions, it was admitted that a drainage rate had been charged upon, and paid without question in respect of, these tidal lands, for many years before the passing of the Land Drainage Act of 1930. If, therefore, these lands are to be exempt, it must be because of the provisions of this section of the statute of 1930. Now, what is the scope of the section ? The marginal note, of course, adds nothing to the force and effect of the enacting words, and yet it may be a convenient label to show what the subject matter of the section is. There can, I think, be no doubt as to what the subject matter of the section is, whether there is any marginal note or not. Subject. (1) begins :

Subject as otherwise expressly provided in this Act, the provisions of this Act shall apply to land belonging to His Majesty in right of the Crown or the Duchy of Lancaster and to land belonging to the Duchy of Cornwall and to land belonging to a government department.

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That is the topic which is being dealt with, land which falls into one or other of those main categories, and then ancillary provisions are made with regard to land in several cases that, for the purposes of the Act, certain officers shall be deemed to be the owners. That, then, is the enacting part of the section providing that the Act shall apply, and providing who, for the purposes of the Act, shall be deemed to be the owner, but the whole area of what is being discussed is land belonging to His Majesty and land belonging to a government department. To that section there is added a proviso which consists of three paragraphs ; para. (a) provides that nothing in the Act is to be taken to operate as a grant by or on behalf of His Majesty as owner of any tidal lands. Para. (b) provides that nothing in the Act is to be taken to authorise any person to do any work on, over, or under any tidal lands, or any lands belonging to His Majesty in right of the Crown, etc., and then

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para. (c) provides that nothing in the Act is to confer any power of levying drainage rates in respect of the said tidal lands ; not " the said or any tidal lands " or " any tidal lands," but " the said tidal lands." The argument, therefore, is that, while the topic of this section is land belonging to the Crown or to a government department, and while the topic of para. (a) of the proviso is a topic limited to tidal lands of His Majesty, when one comes to para. (b) of the proviso, " tidal lands or any lands belonging to His Majesty " means tidal lands belonging to any person whatsoever, or any of the lands belonging to His Majesty, and when one comes to para. (c), " the said tidal lands " is an expression not meaning tidal lands belonging to His Majesty, but all tidal lands whatsoever—a very difficult argument. A

The argument was sought to be fortified by a reference back to the Land Drainage Act of 1918, and our attention was invited to sect. 18 of that Act. That section, however, is dealing with the topic of works, and it is providing that nothing in that part of the Act is to authorise the execution of any works on, over, or under tidal lands below high-water mark, etc. It is not dealing with the power to levy a drainage rate. I find it impossible to think that, by a kind of interpolation, " any tidal lands " in para. (b) of the proviso is to be construed as " any tidal lands whatsoever." I cannot think that the words got in by inadvertence, and that the section, when it was dealing, and dealing only, with the power of levying drainage rates, should have used the words " drainage rates in respect of the said tidal lands," if what was meant to be brought within the scope of the exemption was any tidal lands whatsoever. It was said by learned counsel for the appellant that this was an obscure and difficult section. It seems to me, with great respect, to be reasonably plain, but it would be obscure and difficult indeed if the expression " tidal lands " in three consecutive paragraphs of a proviso should have different meanings, and a meaning different from the subsection to which the proviso was an addition. B C D E F

In my opinion, the justices at the quarter sessions came to a correct conclusion in point of law, and rightly dismissed the appeal which was then before them. I think, therefore, that this appeal ought to be dismissed. G

SWIFT, J. : I agree and have nothing to add.

MACNAGHTEN, J. : I agree.

Appeal dismissed.

Solicitors : Bullen, Debenham, Harston & Bennett (for the appellant) ; Kingsford, Dorman & Co., agents for Kingsford, Arrowsmith & Wightwick, Canterbury (for the respondent board). H

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

NEWPORT BOROUGH COUNCIL v. LEICESTER COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Macnaghten, JJ.), **December 7, 1936.**]

A

Poor law—Settlement—Change of residence—Former place of residence transferred to other authority—"Immediately before"—Newport Extension Act, 1934 (c. lvii), s. 26.

B

A poor person had resided in the county of Monmouth for such a period and in such circumstances, before Feb. 23, 1935, as to acquire a settlement in that county. On Feb. 23, 1935, the poor person went to live in the county of Leicester. On Apr. 1, 1935, by the Newport Extension Act, 1934, the boundary of the borough of Newport was altered to include, *inter alia*, that part of the county of Monmouth in which the poor person had formerly lived. The poor person subsequently became chargeable to the county of Leicester. The Newport Extension Act, 1934, s. 26, provides: "Every person resident in the added areas immediately before the appointed day [Apr. 1, 1935] who has acquired a settlement in the county . . . shall be deemed to have acquired . . . a settlement in . . . the borough":—

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HELD: the poor person was not resident in the county of Monmouth "immediately before" Apr. 1, 1935, within the Newport Extension Act, 1934, s. 26, and his settlement remained in the county of Monmouth.

D

[EDITORIAL NOTE.] The point here discussed is the effect on the poor law settlement of a poor person by an alteration of the area of a local authority. The private Act governing the present case said that persons resident in one of the added areas "immediately before" the alteration took effect should acquire a settlement in the borough to which the area was added. It is decided that "immediately before" means that the poor person was resident in the added area right up to the time of change, and a poor person who left the added area some days before retained his old settlement.

E

AS TO ALTERATION OF AREA AND SETTLEMENT, see HALSBURY, 1st Edn., Vol. 22, Poor Law, p. 577, para. 1222; and FOR CASES, see DIGEST, Vol. 37, pp. 237-239, Nos. 301-315.]

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Case referred to:

(1) *West Ham Union v. Edmonton Union*, [1908] A.C. 1; 37 Digest 237, 304.

CASE STATED by consent of the parties under the Quarter Sessions Act, 1849, s. 11.

G

On Aug. 21, 1935, on the complaint of the respondent council, the Leicester County Council, it was adjudged that the place of the last legal settlement of Percival Harold Kinnersley, a poor person who had on July 23, 1935, become chargeable to the county of Leicester, was in the county borough of Newport, and an order was made for his removal to the county borough of Newport. The Newport borough council

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appealed against the order to quarter sessions, and a case was then stated for the opinion of the divisional court. The facts are set out in the judgment. The Newport Extension Act, 1934, provides as follows:

2. (2) In this Act unless the subject or context otherwise requires—
"The borough" means until the appointed day the existing borough of Newport and thereafter the existing borough of Newport as extended by this Act;

"The appointed day" means Apr. 1, 1935;

"The county" and "the county council" mean respectively the administrative county of Monmouth and the county council of that county;

"The added areas" means . . . the added part of . . . Malpas.

26. (1) Every person resident in the added areas immediately before the appointed day who has acquired or is in the course of acquiring (a) a settlement in the county by reason of residence, birth or other qualification therein; or (b) a status of irremovability from the county by reason of residence therein, shall be deemed to have acquired, or to be in the course of acquiring thereby as the case may require a settlement in or status of irremovability from the borough.

R. M. Montgomery, K.C., and *Vernon Gattie* for the Newport Borough Council.

R. P. Croom-Johnson, K.C., and *F. R. McQuown* for the Leicester County Council.

LORD HEWART, L.C.J. : I am clearly of the opinion that this appeal ought to be allowed. In the case stated, it is found that Kinnersley, the poor person referred to, resided with his father at a certain house in Malpas, in the county of Monmouth, for a period of 3 years and upwards before Feb. 23, 1935, in such circumstances as to acquire a settlement in the county of Monmouth. That, therefore, is by common consent the starting point of the discussion. What happened after that date? On Feb. 23, 1935, Kinnersley, his father having given up the house in Malpas, went to Loughborough, in Leicestershire, and resided there until and after July 23, 1935, on which date he became chargeable to the county of Leicester. In the meantime—namely on Apr. 1, 1935—as a consequence of the passing of the Newport Extension Act, 1934, the boundary of the borough of Newport was in certain respects altered, and it was so altered as to include, among other things, the part of the parish of Malpas that contained the house in Malpas in which Kinnersley had formerly lived. In those circumstances, the question which we have to decide is whether it is true to say that the burden of maintaining this poor person was properly made to fall, as the order of the justices makes it fall, on the county borough of Newport. It is quite obvious, I think, that the settlement of Kinnersley, having been acquired in the county of Monmouth, would there remain unless something quite definite happened to shift it. As was said by LORD LOREBURN, L.C., in *West Ham Union v. Edmonton Union* (1), at p. 6 :

The settlement still is in the place, and if that becomes part of a different area [the settlement] is not gone. Statutory provisions now exist for adjusting the burdens in case of change.

The Act with which we are concerned in the present case, the Newport Extension Act, 1934, expressly provided for the settlement and irremovability and the transfer of liability for the maintenance of the poor. That provision is contained in sect. 26 of the statute. It is important to observe that Mr. Croom-Johnson, in arguing this case, did not at all found himself on the provisions of sect. 26. On the contrary, he seemed

expressly to disavow any help derivable from that quarter, but it is apparent that those who were responsible for settling this case evidently believed that, from the point of view of the county of Monmouth, sect. 26 was nothing less than the sheet anchor. There is only one
 A objection to the argument which was at some time sought to be derived from sect. 26, but it is a serious objection. Sect. 26 expressly names the class of persons whose settlement is to be dealt with under the conditions arising from the extension of the boundaries, namely, those who were resident in the added areas immediately before the “appointed
 B day.” But Kinnersley was not resident in the added area immediately before the appointed day. He had in fact left that area on Feb. 23, 1935, and the extension did not take place until Apr. 1, 1935. “Immediately before” cannot cover Feb. 23. That provision, therefore, is of no help whatever to the county of Monmouth. Indeed, that section makes
 C it perfectly plain that this poor person was excluded from the class therein being dealt with.

There is no other quarter, whether statute or reported decision, from which the argument on behalf of the county of Monmouth derives the slightest assistance. I think, therefore, that the settlement of this man
 D remained undisturbed in the county of Monmouth, and that this appeal ought to succeed. It is unfortunate that the county of Monmouth was not here represented. I cannot imagine that, if it had been expressly represented, any argument could have been adduced on behalf of the county, but, however that may be, I sincerely hope that, after the
 E decision of this appeal by this court, no more public money will be spent in investigating the matter further.

I think that the appeal ought to be allowed.

SWIFT, J. : I agree, and I have nothing to add.

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MACNAGHTEN, J. : I agree.

Appeal allowed, with costs.

Solicitors : *Smith, Rundell, Dods & Bockett*, agents for *O. T. Morgan*, Town Clerk, Newport, Monmouthshire (for the Newport Borough
 G Council); *Kingsford, Dorman & Co.*, agents for *Lucas E. Rumsey*, Leicester (for the Leicester County Council).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

LATTER *v.* COLWILL.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), January 18, 19, 1937.]

Agreement for payment by instalments—One instalment the delivery of specified articles—Balance of original sum to become due on default—Admissibility of evidence of value of specified articles—Penalty clause. A

The defendant owed the plaintiff £266 17s. 6d. for gaming debts. In consideration of the plaintiff's forbearance to press his claim at Tattersalls, the defendant agreed that in settlement of the debt he would give the plaintiff two bronzes, and pay him two instalments of £20 each on specified dates. The agreement provided that, upon default in due payment of any instalment: "the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith." The defendant defaulted in payment of the second instalment of £20, and the plaintiff sued him for £218 17s. 6d., giving credit for the first instalment and the two bronzes at a valuation of £28:— B

HELD [SCOTT, L.J., dissenting]: (i) the expression "the original sum above-mentioned" meant the original debt of £266 17s. 6d., and could not be regarded as the two bronzes and the two money instalments of £20. C

(ii) to ascertain the balance of the original sum payable on default, a money value would have to be put upon the bronzes, and evidence of such value was therefore admissible.

(iii) the clause which provided that the remaining balance of the original sum should become payable in the event of default was not a penalty clause. D

Decision of MACKINNON, J. ([1936] 1 All E.R. 441), *reversed*.

[EDITORIAL NOTE.] The form of contract here in question is commonly found in promissory notes and in fact forms the basis of contracts providing for payments in instalments. The essential feature of such contracts is that upon default in the payment of any one instalment, the whole sum then outstanding is to become due and payable. The peculiarity of the present case is that, as one instalment, the defendant was to deliver two bronzes. The court here considers the effect of the final clause in the present agreement, which was to the effect that, upon default in due payment of any instalment "the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith." The insertion of the words "of the original sum" is held to prevent the contract being construed as one in which the value of the bronzes is irrevocably fixed at the difference between the original debt and the prescribed money payments, and the proper construction is that the inclusion of these words requires the parties to go back again to the original sum and to give credit for such actual amount in money or money's worth as has been received. It is therefore right to admit evidence of the value of the bronzes. E F G

FOR PAYMENT BY INSTALMENTS, see HALSBURY, *Hailsham Edn.*, Vol. 2, p. 614, para. 839; and FOR CASES, see DIGEST, Vol. 6, p. 26, Nos. 156-158.]

Cases referred to:

- (1) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 25 Digest 401, 58. H
- (2) *Bubb v. Yelverton* (1870), L.R. 9 Eq. 471; 25 Digest 400, 55.
- (3) *Re Browne, Ex p. Martingell*, [1904] 2 K.B. 133; 25 Digest 402, 63.
- (4) *Protector Endowment Loan & Annuity Co. v. Grice* (1880), 5 Q.B.D. 592; 7 Digest 220, 628.

(5) *Pinnel's Case* (1602), 5 Co. Rep. 117a; 12 Digest 455, 3678.

(6) *Foakes v. Beer* (1884), 9 App. Cas. 605; 12 Digest 457, 3701.

APPEAL from a decision of MACKINNON, J., dated Mar. 3, 1936, and reported in [1936] 1 All E.R. 441.

A *H. H. Hanworth* for the appellant.

John Senter for the respondent.

Hanworth : The intention of the parties was clearly expressed. If the respondent defaulted, then he would be liable for the balance of the original sum of £266 17s. 6d.

B *Senter* : There was no undertaking to pay the full amount except if the agreement was not carried out; that is a penal provision. The respondent only agreed to settle an unenforceable debt by paying £40 and two bronzes. If that had been carried out, the debt would have been extinguished; but it was not carried out, and so the penal provision came into operation. In *Protector Endowment Loan & Annuity Co. v. Grice* (4), the debtor had agreed to pay the whole sum due, but that was not so here except if there was a default. Because of his default, a larger sum became due. The agreement is silent as to the value of the bronzes, and oral evidence is not admissible. They must
D not be taken to be worth £226, because this was a settlement, and because the respondent also undertook to pay the costs of the action. Nor is the court entitled to read a value into a written agreement. Alternatively, the agreement may be so confused as to be meaningless. [Counsel referred to *Pinnel's Case* (5), *Foakes v. Beer* (6).]

E *Hanworth*, in reply : Here the value of the bronzes is a vital consideration. The defendant's own valuation of them is £28; that is uncontradicted.

F GREER, L.J. : In this case, I have come to the conclusion that the learned judge was wrong in the decision he gave, and that this appeal ought to be allowed, with the usual consequences as regards costs.

Some time before Nov. 3, 1935, the plaintiff, who was a bookmaker, and the defendant, who was a racehorse owner, were engaged in betting transactions, and the result of those transactions, before the agreement,
G was that the defendant owed the plaintiff, on a debt, which was only a debt of honour, the sum of £266 17s. 6d. The plaintiff, of course, as matters then stood, would not have been able with success to have brought an action to recover the £266 17s. 6d. He could have issued a writ, but ultimately the question of whether the contract was void,
H or whether it was illegal because it had been put from time to time into cheques, would have had to be decided, and would have been necessarily decided, in the absence of express agreement, in favour of the defendant. But, at the request of the defendant, time was given to enable him to pay. On several occasions, his time for meeting his obligations

was extended, and, notwithstanding those various extensions of time, he failed to meet what has been called in several cases his obligation of honour, his debt of honour; that is to say, he failed to pay the £266 17s. 6d. Then, in order to get further time and not be pressed by a writ, and legal proceedings, which would have published to the world what would have been regarded, in betting circles, as dishonourable conduct, he asked the plaintiff to enter into an agreement. They entered into the agreement dated Nov. 3, 1935, upon which the action, which was started on Jan. 20, 1936, was based. A

Now, before the agreement was signed, the parties had come to a conclusion about it, and I agree with the proposition, which is a well known proposition in the law of evidence, that you cannot give evidence of the negotiations, when those negotiations have resulted in a written agreement; but you can always give evidence, for the purpose of interpreting the agreement, of the surrounding facts, of the circumstances in which the agreement was signed. The agreement is in the following words: B

I am indebted to Arthur James Latter in the sum of £266 17s. 6d. Now, in consideration of his forbearance—at my request—to press his claim before Tattersalls Committee to-morrow [he had given notice of his intention to press that claim] and upon the understanding that no other steps shall be taken which might be detrimental to me— C

many steps might have been taken, other than the pressing of the claim to the Tattersalls Committee; he could have been declared a defaulter to the fellow members of the same association to which the two of them belonged— D

I hereby undertake to settle the said sum of £266 17s. 6d., and, upon discontinuance, the costs of the action commenced against me on Apr. 27, 1934— E

that clearly is a promise, in consideration of the forbearance above-mentioned, and the other consideration mentioned in the early part of the agreement. Then the agreement goes on as follows: F

by giving him a pair of bronzes (men) to-morrow, Nov. 4, 1935; £20 likewise on Nov. 4, 1935, and £20 on Jan. 1, 1936, in settlement. Should I default in the surrender of my bronzes and/or in the due payment of any instalment, I agree that the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith. G

Now, it has not been contended in this appeal, and, as I understand it, was not contended before the learned judge who gave judgment in this case, that the agreement was void because it was merely an agreement to pay a debt which could not be recovered at law. If that point had been raised, it would have been completely answered by citing the decision of the Court of Appeal in *Hyams v. Stuart King* (1). In that case, SIR GORELL BARNES, P., as he then was, investigated all the cases that had been decided upon similar questions, and the court, by a majority, came to the conclusion that an agreement very similar to the present H

agreement could be enforced, though the original debt was not only void and unenforceable, but also illegal, by reason of the fact that it had been converted into an agreement by security; that is to say, by cheque. I want to quote only one part of the judgment. After dealing
A with the earlier cases, he cites the case of *Bubb v. Yelverton* (2), and, in doing so, he cites with approval what the rule is in regard to the matters we have to consider in the present case. He cites the words of LORD ROMILLY, M.R., in the case of *Bubb v. Yelverton* (2) in these terms, at p. 702 :

B I do not mean to express any opinion, whatever I may think upon the subject, whether, if a person incurs debts in racing, and gives a bond for payment of them, the bond can be proved against his estate. But here there was a perfectly good consideration quite ulterior to and independent of any racing debt. It is impossible to read the evidence without seeing that it was given, not to pay racing debts, but to avoid the consequences of not having paid them.

C And, if there is an agreement to avoid the consequences of not having paid a betting debt, then that is sufficient to support as consideration an agreement of the kind in question in this action. Now, we still have to decide what the true interpretation of the agreement is, and, in deciding the interpretation of the words used in an agreement, it is
D always permissible to look at the surrounding circumstances, not for the purpose of substituting for the agreement something that was said in the course of the negotiations, but for the purpose of interpreting the agreement, and it seems to me in the first place that it is quite clear that the last sentence of the agreement :

E should I default in the surrender of my bronzes and/or in the due payment of any instalment, I agree that the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith—

is a second promise for the consideration stated in the earlier part of the agreement, and just as much a promise in return for that consideration
F as is the earlier promise to pay the instalments.

Then, next, we have to consider : What does it mean between the parties in the circumstances in which it was entered into ? I think it means that, for the considerations therein stated, the defendant agrees to pay the whole then remaining balance of the original sum above
G provided. What is "the original sum above-mentioned ?" If this case were concerned with a failure to provide the first two instalments which were to be provided, I think the day after the date of the agreement, namely, the handing over of the bronzes and the £20 instalment, I read the last clause as an agreement that, if that is not done, then
H there is a promise, for the considerations above stated, to pay the remaining balance, which may be, of course, the whole amount. Now, what could be the meaning of "the original sum above-mentioned ?" I should say the learned judge has treated it as meaning the bronzes plus the two payments of £20. Supposing the question had arisen, as it

might easily have arisen under this contract, by reason of a failure to pay the first two instalments, namely, the bronzes and the £20. What would be the meaning of the words "I agree that the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith?" At that time, the only sum that could be regarded as "the original sum above-mentioned" would be the £266 17s. 6d. It could not refer, if the condition which was not performed was the first failure, to that which would follow from the adding of the subsequent sum of £20. It could not mean that, because that would not have been the original sum above-mentioned. It must mean exactly the same thing, whether the default is in the first instalment or whether the default is in the last instalment. The learned judge adopted the view that what was meant by the final words was merely an agreement to pay the sum which could be arrived at by adding up the bronzes and the two sums of £20. In my judgment, we could, for the purpose of interpreting what the parties meant by the last clause in the agreement, take into account the fact that the bronzes were accepted by both parties, before they entered into the agreement, for the purposes of the agreement, as equivalent to £28. But it is not necessary to go so far as that, because it would not be possible to interpret the last clause of the agreement without putting a value upon the bronzes, and the last clause of the agreement was intended to mean something; it was intended to mean that it should be the balance of the original sum above-mentioned which was to become payable forthwith. That could only be ascertained inasmuch as one of the instalments was two bronzes. That could only mean that the balance must be obtained by ascertaining in some way or another what figure should be attached to the bronzes in order to ascertain what the parties were referring to when they spoke of the balance, which was not a balance of three money payments, but was a balance of handing over the bronzes and two money payments. They must have intended that, in some way or another, the two bronzes should be converted into money for the purpose of deciding what the balance was that was payable, and it does not seem to matter whether the value was ascertained by proof of what was the value of the two bronzes, or by proof of what was admitted by the defendant to be the value of the two bronzes.

That being the position, it seems to me that the agreement is exactly the same, and has exactly the same effect as if it had said "In consideration of the forbearance," etc., "I agree to pay the original sum"—that is to say, the £266 17s. 6d.—"provided I pay certain instalments towards it, which consist of two bronzes and two sums of £20, then you, the plaintiff, will accept those payments in full settlement." I have very little doubt as to why the two bronzes were introduced, instead of it being three sums of £20. It was because Mr. A. Harrison Ford was

aware of the fact that there is a rule of law that you cannot make an enforceable agreement out of a payment of a lesser sum in respect of a higher amount due, because that would be an agreement without consideration.

- A In conclusion, all I have to say is that, this being a question of the interpretation of a document, it is possible for acute minds to differ about a question of that kind, and, although I have myself not been able to feel any doubt as to what the meaning of this document is, or as to what the relevancy of the value of the bronzes is to the interpretation of the last clause in the agreement, I am quite ready to concede that it is possible that other minds may take a different view about the question of interpretation. There is only one other point I think I might add with respect to the able argument of Mr. Senter. Mr. Senter pressed the point that this was apparently a point that he would have made before the learned judge if he had been called upon, which he did not make, but which he is entitled to make here, because he is entitled to say that the learned judge was right for some reasons other than those which the learned judge gave. That is the fortunate position of a respondent. Now, dealing with that question, I think that argument is not entitled to succeed, because I do not think the last clause is a penalty for the non-payment of the instalments. I think it is an undertaking within the case of *Hyams v. Stuart King* (1) that the defendant will pay, for the considerations above stated, the amount which the plaintiff could not have got without the new agreement, because it was a betting debt.

For those reasons, I think the learned judge's decision was one with which we ought to disagree, and that this appeal should be allowed with costs.

- F SLESSER, L.J. : This is an action claiming £218 17s. 6d., being the balance of money due under an agreement in writing signed by the defendant, and dated Nov. 3, 1935. It being a claim based upon a written agreement, it is necessary, therefore, to consider that agreement to see whether the claim is well founded. The terms of the memorandum of Nov. 3, 1935, have been read by my Lord ; but, in so far as the whole result of this case must depend upon the proper construction of that written document, I wish to refer to certain terms of it again. I would observe, in the first instance, that the memorandum begins with a declaration of indebtedness to Arthur James Latter—that is to say, H the plaintiff—in the sum of £266 17s. 6d. There is no mention, so far, of the reason why, or the circumstances in which, that indebtedness has arisen. It is necessary to go, in my opinion, to the surrounding circumstances in order to discover that this was an obligation arising out of a gaming transaction, and, therefore, at the highest, no more than

a debt of honour. But that statement does not appear in the first paragraph of the memorandum. It is true that, in the second paragraph of the memorandum, it is stated that the consideration of the undertaking to settle the sum of £266 17s. 6d.—which I construe as meaning an undertaking to pay it except in the circumstances afterwards stated— A is said to be “forbearance at my request to press his claim before Tattersalls Committee.” It may be said that that in itself is a recognition of the fact that, but for that claim before Tattersalls Committee, this would be an unenforceable debt at law. But all these considerations require, I think, reference to surrounding circumstances, and do to B some extent raise an ambiguity. I think that it is right to consider the surrounding circumstances in this matter, and I start from the assumption, which is the true assumption, that this was a gaming debt, and that the sole consideration, as stated, was the abstention of the plaintiff from pressing a claim before Tattersalls Committee, without C which claim he could not hope in law to press the defendant to pay anything at all. Now, as my Lord has said, the case of *Hyams v. Stuart King* (1) has made it clear beyond question that the withdrawal of a debt not enforceable at law before such a body as Tattersalls Committee, which might have the power otherwise to inflict some penalty upon the D defendant, which would not in law, but in practice, operate as a sanction for his failure to pay his debt, is an adequate consideration. Mr. Senter pressed upon us that, on the facts of *Hyams v. Stuart King* (1), the penalty which the defendant would be likely to suffer, if the decision was given against him, was more serious than anything which appears E in the present case—that is to say, that he would have been posted—and here all that is concerned directly is the institution of a claim. He says—I know not on what authority, and I cannot speculate—that the result of the entertainment of the claim would have been merely an order to pay by instalments. There is no evidence of that. But in an earlier F case, the case of *Re Browne, Ex p. Martingell* (3), the debtor gave the creditor bills in consideration merely of a letter of complaint sent to a club being withdrawn. That case was cited with approval by the majority of the court in *Hyams v. Stuart King* (1). Indeed, it matters not what the amount of the consideration is. So long as there is con- G sideration in the forbearance, that is enough to support the contract. Now, at that stage, it appears to me to be sufficient consideration on an acknowledgment of a debt of £266 17s. 6d., and subject to certain conditions stated in the contract, the final limb of the contract would come into operation to this effect: “Should I default in the surrender H of my bronzes and/or in the due payment of any instalment, I agree that the whole then remaining balance of the original sum above-mentioned shall become due and payable forthwith.”

Now, I think it right to read the agreement in the first instance in

that way, because the payment by instalments of certain sums, and the delivery of the bronzes by instalments, which are mentioned in the body of the agreement, must first be considered, I think, from the point of view that they are never paid at all, and no bronzes handed over.

- A** I start my interpretation by asking myself: Supposing on Nov. 4, 1935, that is, on the day after the making of the agreement, Mr. Colwill had failed to hand over the bronzes or pay the £20, what would have been the effect on this agreement? There would have been a default, and the whole then remaining balance of the original sum above-mentioned
- B** would have become due. I think it impossible, when the matter is put in that light, to come to any other conclusion than that "the original sum above-mentioned" must be the whole £266 17s. 6d. The balance, in that case, would be a balance struck, being the whole amount due on the one side, and nothing to come by way of deduction on the other.
- C** To that extent, subject to one observation, which I shall hereafter make, it would appear to me clear that the construction which the learned judge has put upon this document could not possibly be correct. That I believe to be the root of this agreement; that is to say, that, if default be made in the matters which are mentioned in the agreement,
- D** the original sum above-mentioned—that is to say, £266 17s. 6d.—shall become due. Had Mr. Colwill in fact not handed over his bronzes on Nov. 4 and not paid his £20 on that date, then, in my view, there would have been no answer at all to this claim.

- Now, in fact, it is said, as I understand Mr. Senter, that, even on
- E** any view, this ought to be construed as a penalty. I do not agree. I think that this case resembles the case mentioned by BRAMWELL, L.J., in the case of *Protector Endowment Loan & Annuity Co. v. Grice* (4), where he says this at p. 596:

- F** but when it forms part of the original intention, that upon default a sum otherwise payable at a future period, shall become forthwith payable, it is no longer a penalty.

I think that is exactly the intention to be gathered from this document, that the sum, otherwise payable at a future date, on default shall become due and payable forthwith.

- G** Now, I pass from that to the actual facts of this case. In fact, Mr. Colwill did hand over his bronzes, and did pay £20 as required on Nov. 4, 1935, but he was required further, as a condition by which he could avoid liability as the agreement says, in settlement to pay another £20 on Jan. 1, 1936. That second £20 he omitted to pay. He therefore, in
- H** my opinion, was unable to avail himself of those conditions which would have enabled him to settle the debt of £266 17s. 6d. by handing over the bronzes, paying the £20 on Nov. 4, and paying another £20 on Jan. 1, 1936, and, as the agreement then recites, the whole of the then remaining balance of the original sum above-mentioned became due.

Only one further matter remains for consideration. One of the conditions was that the pair of bronzes should be handed over on Nov. 4. Now if, as I have said, by reason of the fact that the latter £20 was not handed over on Jan. 1, 1936, in settlement, "the whole then remaining balance of the original sum above-mentioned shall become due," the question arises: How can you ascertain that balance, when you have to deduct, from the sum become due, not only the first £20, but also the bronzes. It is, in my opinion, quite clear that the bronzes must be quantified in value, in order that they may be included in the balance, to discover what sum has become due. To take any other view, in my opinion, would be to say that this agreement was meaningless, by reason of the fact that the balance was unascertainable. But, as I have already pointed out, if nothing had been handed over, if no bronzes had been handed over, the balance ascertainable would have been apparent; that is to say, £266 17s. 6d. I shrink from the view that this agreement is meaningless, when the bronzes have been paid over, and unenforceable. It would have been quite full of meaning and competent to be enforced if the bronzes had not been handed over, and, having regard to the fact that, in order to arrive at the balance, the bronzes must be quantified in value, it seems to me that one is not departing from any rule of evidence in saying here that, there being this ambiguity, not as to what has to be done, but as to the means of working out the contract—because the bronzes, as such, cannot be treated as a balance—one must read into this contract, to give it commercial efficacy, "a pair of bronzes worth so much." Now, that value may be ascertained in one of two ways. It might have been that the court would have received evidence of the value of those bronzes, and I think, in such a case, the court would have been entitled, in working out the balance due, to have treated the evidence as to what the bronzes were reasonably worth as evidence to explain, to give commercial efficacy to, the contract. But, in fact, in this case, the evidence was that these bronzes were worth £28. The uncontradicted evidence given by Mr. Latter, and Mr. Irvines, who was, as we are told, under the name of Alfred Harrison Ford, the author of this somewhat difficult agreement, was that the defendant himself had stated that the bronzes were worth £28, and that the agreement was made on those terms. In that view, the learned judge I think to that extent having accepted the view that, if the value of the bronzes was relevant at all, it was to be treated as £28, it is not necessary to go further, and to ask for further evidence as to what they were worth, since, by the agreement of all the parties, they were to be treated as of a value of £28. It follows, therefore, that that £28, which I treat as the quantified value of the bronzes, being added to the £20 already paid, the plaintiff was right in giving credit for £48, as appears in his particulars of statement of claim, and that therefore the balance of

the original sum mentioned in the agreement being due, he is entitled to recover by way of damages £218 17s. 6d., and that this appeal should succeed.

A SCOTT, L.J. : In this case, although not without diffidence and hesitation, I feel bound to differ from the two judgments just delivered.

The case was well and tersely argued on behalf of the respondent, and I think he ought to have had our judgment. I agree with what my brethren said about agreements for good consideration to pay an existing gaming debt, and Mr. Senter, as I understood, wholly accepted that position. The reasons why I differ, and the extent of my differences, are as follow : I do not think evidence was admissible to prove that the agreement, recorded in the written document, contained a term that, for the purpose of the last clause, the bronzes should be deemed to be a money payment, either due or made, as the case might be, of £28 sterling ; and, without such a term, there was no provision in the agreement, and, I think, no other justification, for converting bronzes into sterling. It is said by my brethren that such evidence was admissible in order to prove "surrounding circumstances," but, in my view, that rule of evidence, to which resort may be had as an aid to interpretation of a written agreement, does not let in evidence which alters the written agreement, either by omitting or modifying an express term, or by adding a new term. So to use the rule would be to abrogate the parol evidence rule, and let in evidence which is forbidden by it, such as evidence of negotiations. A collateral agreement might have been made on such lines, and, if made, might conceivably have supported the plaintiff's claim, but none is pleaded. The statement of claim endorsed on the writ merely treats the bronzes as a credit of £28, which they were not. Mere evidence of value *ex post facto*, even if found as a fact to prove a figure of £28, would not, in my view, be admissible on the pleadings to help the plaintiff out of his difficulty. In the result, I think the judicial choice of conclusions is limited to two : either (i) that reached by the learned judge, namely, that, after surrender of the bronzes, "the whole then remaining balance of the original sum" mentioned in the first two lines of the agreement was to be treated as reduced to £40, or to £20 if one payment of £20 had already been made ; or (ii) that the last clause of the agreement is too ambiguous to be susceptible of enforcement in the circumstances which have arisen. It is not, in my view, necessary, in the absence of a cross-appeal, to decide which conclusion is right, for either suffices to dismiss the appeal. The fact that the defendant's wife, on Jan. 8, sent to the plaintiff her own cheque for the second instalment, post-dated to Jan. 30, is, of course, no equivalent in law for the payment of £20 in cash on the due date, Jan. 1 ; but I cannot see that the plaintiff has any particular claim

upon our sympathy, if the agreement is read strictly by the court, with the result at which I have arrived.

As the majority of the court is against my view, this appeal will, of course, be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords A, refused.

Solicitors: *Leslie Marrison* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*] B

Re KEEN'S ESTATE, EVERSHED v. GRIFFITHS.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
December 14, 15, 16, 1936, January 21, 1937.] C

Trusts—Secret trust—Expressed in writing—Prior to date of will—Will referring to future notification to trustees—Validity.

The testator gave to his two trustees and executors a sum of £10,000 to be held upon trust and disposed of among such persons or charities as might be notified by him to them or either of them during his lifetime. In default of notification the fund was to fall into residue. In fact the testator had made a similar will shortly before and had then given one of his trustees a sealed envelope containing the necessary directions. The testator directed the trustees not to open the envelope in his lifetime and it was in fact opened after his death:— D

Held: (i) placing the particulars in the physical possession of the trustees during the testator's lifetime was a sufficient compliance with the clause, despite the fact that they were not to read the actual particulars until after his death. E

(ii) on its proper construction the clause in the will was a reservation by the testator of a power to make future dispositions without a duly attested codicil, simply by notifying them to his trustees in his lifetime and was, therefore, invalid. F

(iii) objection could not be taken to the fact that the letter was given to one trustee only.

Decision of FARWELL, J., affirmed on other grounds.

[EDITORIAL NOTE.] This case decides two incidental points in connection with memoranda intended to be incorporated with a will. It is sufficient if the executor receives the document enclosed in an envelope with instructions that it is not to be opened until after the death of the testator. It is also sufficient if it is only given to one of two or more trustees so long as he receives it as a co-trustee. The difficulty in the case was really a slip in the drafting which made the clause one referring to directions to be notified to the trustee in the future. This objection was held fatal although the notification was in fact before the execution of the will. G

AS TO SECRET TRUSTS IN WRITING, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 21, 22, paras. 34-36; and FOR CASES, see DIGEST, Vol. 43, pp. 598, 599, Nos. 461-471.] H

Cases referred to:

(1) *Re Boyes, Boyes v. Carritt* (1884), 26 Ch. D. 531; 43 Digest 601, 487.

- (2) *Blackwell v. Blackwell*, [1929] A.C. 318; Digest Supp.
 (3) *McCormick v. Grogan* (1869), L.R. 4 H.L. 82; 43 Digest 600, 480.
 (4) *Johnson v. Ball* (1851), 5 De G. & Sm. 85; 43 Digest 598, 464.
 (5) *Riordan v. Banon* (1876), 10 I.R.Eq. 469; 43 Digest 599, case q.
 (6) *Re Hetley, Hetley v. Hetley*, [1902] 2 Ch. 866; 43 Digest 592, 415.
 (7) *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594; 43 Digest 598, 463.
 (8) *Re Huxtable, Huxtable v. Crawford*, [1902] 2 Ch. 793; 8 Digest 304, 832.
 (9) *Re Hawksley's Settlements, Black v. Tidy*, [1934] Ch. 384; Digest Supp.
 (10) *Re Gardner, Huey v. Cunningham*, [1920] 2 Ch. 523; 43 Digest 598, 465.

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C

APPEAL from an order of FARWELL, J., made in an adjourned summons, on May 5, 1936. The appellant was the first defendant to the summons, and she claimed to be beneficially entitled, under a secret trust, to a sum of £10,000, bequeathed by cl. 5 of the will of Harry August Keen, who died on Apr. 23, 1935. The material provisions of the will, and the circumstances alleged to give rise to the secret trust are fully set out in the judgment of LORD WRIGHT, M.R., herein, as are also the grounds upon which FARWELL, J., based his judgment.

R. F. Roxburgh, K.C., and *G. P. Slade*, for the appellant, the first defendant to the summons.

D

H. B. Vaisey, K.C., and *Neville Gray*, for the first respondents, the defendants to the summons, who were interested under the testator's will as residuary legatees.

N. C. Armitage, for the plaintiff to the summons, one of the trustees of the testator's will.

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Roxburgh, K.C.: The questions in this appeal are (i) whether the notification was a notification within the terms of the will; (ii) if it was, whether it was a sufficient communication within the meaning of the authorities; (iii) whether the fact that in this gift the testator has used words of futurity makes any difference to the law of secret trusts laid down in *Blackwell v. Blackwell* (2). As to (i), the fact that the words in the will were wider than was necessary to cover such a contemporaneous notification as was made does not prevent the notification being within the terms of the will. The inclusion of a resulting trust in favour of the residuary legatees, in cl. 5, shows that the testator contemplated that he might not make any notification subsequent to the date of the will. As to (ii), if this notification was within the terms of the will, then there was a sufficient communication of the testator's intention to the trustees: see *Re Boyes, Boyes v. Carritt* (1). *McCormick v. Grogan* (3) shows clearly that, for the doctrine of secret trusts, such a communication as we have here is sufficient. It is not necessary that the trustee should have seen the terms of the document, provided that the purpose of the trust has been communicated to him. It is sufficient if there has been put into the trustee's possession a document containing all that he requires to know about the trust. As to (iii), the authorities on the effect, on the doctrine of secret trusts, of words of futurity in the will,

are not so clear, but *Riordan v. Banon* (5) is in favour of the view that it does not matter that there are words of futurity in the will, if the communication in fact made by the testator was antecedent to, or contemporaneous with, the will. The fact that the testator thought that he could withdraw the communication which he had made does not affect the doctrine of secret trusts laid down in *Blackwell v. Blackwell* (2). The only common basis of the judgments in *Blackwell v. Blackwell* (2) is that the doctrine of secret trusts is removed from the sphere of the Wills Act. All that is necessary is to find an absolute disposition in favour of a legatee, it being immaterial whether or not he takes as a trustee. As it would be a fraud on the testator to allow the trustee to take beneficially, the question is whether a trust is to be enforced against him in favour of the undisclosed beneficiary, or whether a resulting trust is to be enforced in favour of the next of kin or residuary legatees. In *Blackwell v. Blackwell* (2), which differs from the present case in that there was there no trust in the favour of the residuary legatees, the trust was enforced in favour of the undisclosed beneficiary. There is no reason why the residuary legatees in this case should be more favourably treated than the next of kin in *Blackwell v. Blackwell* (2).

As to the extent of the doctrine in *Blackwell v. Blackwell* (2), there is logically no reason why it should be limited to cases where the trust has been communicated, or, at any rate, formulated, at the date of the will. But the expressions, in the judgments in that case, dealing with words of futurity, are *obiter* only, as the words which there had to be considered were not words of futurity. The only two cases where the words used have been words of futurity are *Re Hawksley's Settlements*, *Black v. Tidy* (9), and *Re Hetley, Hetley v. Hetley* (6).

GREENE, L.J. : The question was referred to in *Johnson v. Ball* (4), which was followed in *Blackwell v. Blackwell* (2).

Roxburgh, K.C. : In that case, there was no communication, so that it is not germane to consider what would have been the effect of the words used if there had been a communication.

ROMER, L.J. : But, if you are right, it must follow that in a secret trust it is possible for the testator to change his instructions at any moment.

Roxburgh, K.C. : I agree, if the property is given to the legatee absolutely, but not where it is given to him as trustee. For this distinction, see *Re Gardner, Huey v. Cunningham* (10), at p. 532. Where the legacy is given to the legatee absolutely, if a fresh trust is imposed after the date of the will, nothing is being done which violates the Wills Act.

Vaisey, K.C. : Looking at the will and the memorandum together, one is drawn irresistibly to the conclusion (a) that what the testator was thinking about was a future communication, (b) no information was given in accordance with the terms of the will, (c) even if it was so given, it was

- ineffective within the meaning of *Blackwell v. Blackwell* (2), and *Re Boyes, Boyes v. Carritt* (1). As to (a), the words of the will are not only words of futurity, but also words of hypothesis. The testator was envisaging three possibilities, (i) that he might give a notification which exhausted the fund, (ii) that he might give a notification which had a partial operation on the fund, and (iii) that he might give no notification at all. What he never considered was that he had already given a notification which would exhaust the fund, and he cannot, therefore, have been referring to the memorandum in the envelope which was in existence before he executed his will. If the testator had subsequently told the trustee to look in the envelope, the situation might have been different. The trustee's evidence shows that he *thought* the envelope contained a notification, not that he knew that it did. As to (c), the contention that the words of futurity used by the testator may be disregarded, as he did not in fact avail himself of the power which he thought he had reserved, involves an extension of the principle laid down in *Blackwell v. Blackwell* (2), which would be contrary to *Re Boyes, Boyes v. Carritt* (1), *Johnson v. Ball* (4), and *Re Gardner, Huey v. Cunningham* (10). The court, in *Blackwell v. Blackwell* (2), did not think that it was overruling *Johnson v. Ball* (4), which is very like this case only stronger, as the trustees there knew exactly what they were going to do.

- LORD WRIGHT, M.R. : The question in this appeal is as to the construction and effect of cl. 5 of the will, dated Aug. 11, 1932, of Harry Augustus Keen. The clause is in the following terms :

- I give to the said Charles Arthur Cheshyre Hazelhurst and Edward Evershed the sum of £10,000 free of duty to be held upon trust and disposed of by them among such person persons or charities as may be notified by me to them or either of them during my lifetime and in default of such notification and so far as such notification shall not extend I declare that the said sum of £10,000 or such part thereof as shall not be disposed of in manner aforesaid shall fall into and form part of my residuary estate.

- The executors and trustees under the will were Captain Hazelhurst and Edward Evershed. It is not necessary to refer to other provisions of the will, which revoked all previous testamentary dispositions. Certain facts must, however, be stated. In 1928, the testator made a will, which contained a clause in terms identical with the clause now in question, except that the amount was £5,000. Mr. Evershed, who acted throughout as the testator's solicitor, gave evidence that the testator told him that he wished to leave a legacy to a person whose name he did not wish published in the will, but gave him no further information. He drafted the clause on these instructions. In Mar., 1932, the testator made a new will. He altered the £5,000 to £10,000 and, having previously said he would put a memorandum with the will giving the name of the person, address, and amount, he did, on Mar. 31, 1932, when he signed

the engrossment, bring a sealed envelope containing the memorandum. That envelope was addressed to Captain Hazelhurst and Mr. Evershed. It contained, in fact, as was afterwards ascertained, a memorandum, dated Mar. 31, 1932, signed by the testator, containing the name and address of the lady, with the addition of the words "in accordance with the directions in my will," and the figure of £10,000. The testator did not tell Mr. Evershed what were the contents of the memorandum, the envelope containing which was not to be opened until after his death, but Mr. Evershed understood, when he took the envelope, that he was accepting the terms of the directions contained in the memorandum, which he believed to be a notification within the terms of cl. 5. When, in Aug., 1932, the will now in question was executed, cl. 5 was left unaltered. Mr. Evershed still retained the sealed envelope, and still believed that the note which it contained constituted the notification referred to in cl. 5, and still regarded himself as having undertaken, and as being bound, to apply the £10,000 in accordance with the directions in the memorandum. The sealed envelope was kept with the will, and was opened on the testator's death. It does not appear that Captain Hazelhurst was notified of these circumstances until after the death. It is, however, clear that Mr. Evershed held the sealed envelope as co-executor and co-trustee, and not as solicitor, of the testator.

An originating summons was taken out to determine whether the £10,000 is held by Captain Hazelhurst and Mr. Evershed as in trust for the lady, or whether, under the final part of cl. 5, it falls into residue. The summons came before FARWELL, J., who decided adversely to the claims of the lady, on the short ground that she could not prove that she was a person notified to the trustees by the testator during his lifetime, within the words of cl. 5. His opinion seems to be that the clause required the name and identity of the lady to be expressly disclosed to the trustees during the testator's lifetime, so that it was not sufficient to place these particulars in the physical possession of the trustees, or one of them, in the form of a memorandum which they were not to read till the testator's death. I am unable to accept this conclusion, which appears to me to put too narrow a construction on the word "notified," as used in cl. 5, in all the circumstances of the case. A parallel case is that of a ship which sails under sealed orders, that is sailing under orders though the exact terms are not ascertained by the captain till later. I note that the case of a trust, put into writing, which is placed in the trustees' hands in a sealed envelope, was hypothetically treated by KAY, J., as possibly constituting a communication in a case of this nature: *Re Boyes* (1) at p. 536. This, so far as it goes, seems to support my conclusion. The trustees had the means of knowledge available, whenever it became necessary and proper to open the envelope. I think Mr. Evershed was right in understanding that the giving of the sealed

envelope was a notification within cl. 5. This makes it necessary to examine the matter on a wider basis, and to consider the principles of law which were argued both before FARWELL, J., and before this court, but which the judge found it merely necessary to mention. There are

A two main questions: first, how far parol evidence is admissible to define the trust under such a clause as this, and, secondly, and in particular, how far such evidence, if admissible at all, would be excluded on the ground that it would be inconsistent with the true meaning of cl. 5.

It is first necessary to state what, in my opinion, is the true construction of the words of the clause. These words, in my opinion, can be considered only as referring to a definition of trusts which have not yet, at the date of the will, been established, and which, between that date and the testator's death, may or may not be established. Mr. Roxburgh, basing himself in particular on the word "may," has

C strenuously argued that the clause, even though it covers future dispositions, also includes a disposition antecedent to or contemporaneous with the execution of the will. I do not think that even so wide a construction of the word "may" would enable Mr. Roxburgh's contention to succeed, but, in any case, I do not feel able to accept it. The

D words of the clause seem to me to refer only to something future and hypothetical, to something as to which the testator is reserving an option whether to do or not to do it. It must then be considered whether the first paragraph of the clause can be held valid as a testamentary disposition. It is said, on behalf of the residuary legatees, some of whom are infants, that it cannot, and that the only trust which takes effect is that which operates in their favour in the event of the provisions of the first part of the clause proving ineffective.

E

The principles of law or equity relevant in a question of this nature have now been authoritatively settled or discussed by the House of

F Lords in *Blackwell v. Blackwell* (2). In 1869, in *McCormick v. Grogan* (3), the House of Lords had held that a secret trust—that is, a trust created by an expression of the testator's wishes, communicated to and accepted by the legatee—bound the conscience of the legatee, though in the terms of the will the bequest was absolute. Such a trust was held to be

G altogether outside the will; the will took effect according to its terms, and the property passed absolutely to the legatee; but the court, it was held, would compel the legatee to apply that property according to the undertaking he had assumed, to carry out the wishes of the testator. It would be a fraud or breach of faith not to fulfil the under-

H taking, which the legatee had given, to carry out the purposes for which the bequest to him was made. No complication was involved in such a case by reason of the Wills Act, 1837, s. 9. The testamentary disposition, which had been duly attested, received full effect. But a different question had to be considered when, in the will itself, the

property was left to the legatee in trust, but neither the nature of the trust nor its beneficiaries was defined in the will. That was the case decided in *Blackwell v. Blackwell* (2). There was, in that case, a bequest to trustees, to apply the income for the purposes indicated by the testator and at any time to pay part of the corpus to such person or persons indicated by the testator as they might think fit, the balance to fall into the residuary estate. The testator had, by parol, at or before the execution of the will, indicated or defined the nature of the trust and the beneficiaries, and the trustees had accepted the trust on these terms. It was held that parol evidence was admissible to explain the trusts, and to prove that the trustees had accepted the legacy on the condition of fulfilling them. The trusts were, accordingly, when thus established, proper to be enforced by the court. There was, it was held, in such a case, no conflict between the express terms of the will and the actual trusts intended, and the evidence was not admitted to add to or vary or contradict what the will said, or to fill up blanks in it, or to specify what was left vague. As VISCOUNT SUMNER said, at p. 339 :

It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees.

The conclusion thus was that, just as much as in the case of a secret trust of the type discussed in *McCormick v. Grogan* (3), the conscience of the legatee was affected ; it made no difference whether, according to its terms, the will left the property to the legatee absolutely, or on a trust which the will did not specify. The essential conditions were that the trust had been disclosed to the legatee as the testator's object in leaving the property, and had been accepted by him.

So it was held by the House of Lords, following a series of decisions since 1688, first under the Statute of Frauds, and, later, under the Statute of Wills, which was held to have made no change in the law in this respect. Doubts had been expressed by eminent lawyers as to the correctness of these earlier decisions, but they were thus disposed of by the House of Lords in *Blackwell v. Blackwell* (2) ; the general equitable jurisdiction to prevent a breach of faith, or the failure of a trust duly declared and accepted, was held to override the technical objections. VISCOUNT SUMNER stated his conclusion, which agreed with that expressed in the speeches of LORD BUCKMASTER and LORD WARRINGTON, in the following words, at p. 339 :

Accordingly I think the conclusion is confirmed, which the frame of sect. 9 of the Wills Act seems to me to carry on its face, that the legislation did not purport to interfere with the exercise of a general equitable jurisdiction, even in connection with secret dispositions of a testator, except in so far as reinforcement of the formalities required for a valid will might indirectly limit it. The effect, therefore, of a bequest being made in terms on trust, without any statement in the will to show what the trust is, remains to be decided by the law as laid down by the courts before and since the Act and does not depend on the Act itself.

But he goes on to add qualifications which are essentially relevant for the determination of the present case. These are qualifications which flow from the circumstance that the will is not completely silent as to the trust, as is the case in wills of the type discussed in *McCormick v. Grogan* (3), but does, in express terms, indicate that there is a trust. The qualifications are thus stated by VISCOUNT SUMNER, at p. 339 :

- B The limits, beyond which the rules as to unspecified trusts must not be carried, have often been discussed. A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime : *Johnson v. Ball* (4) ; *Re Boyes, Boyes v. Carritt* (1) ; *Riordan v. Banon* (5) ; *Re Hetley, Hetley v. Hetley* (6). To hold otherwise would indeed be to enable the testator to " give the go-by " to the requirements of the Wills Act, because he did not choose to comply with them.
- C As, in my judgment, cl. 5 should be considered as contemplating future dispositions, and as reserving to the testator the power of making such dispositions without a duly attested codicil, simply by notifying them during his lifetime, the principles laid down by VISCOUNT SUMNER must be fatal to the appellant's claim. Indeed, they would be equally
- D fatal even on the construction for which Mr. Roxburgh contended, that the clause covered both anterior or contemporaneous notifications and future notifications. The clause would be equally invalid, but, as already explained, I cannot accept that construction. In *Blackwell v. Blackwell* (2), *Re Fleetwood, Sidgreaves v. Brewer* (7), and *Re Huxtable, Huxtable v. Crawford* (8), the trusts had been specifically declared to some or all of the trustees, at or before the execution of the will, and the language of the will was consistent with that fact. There was, in these cases, no reservation of a future power to change the trusts, in whole or in part. Such a power would involve a power to change a testa-
- F mentary disposition by an unexecuted codicil, and would violate sect. 9 of the Wills Act. This was so held in *Re Hetley, Hetley v. Hetley* (6). *Johnson v. Ball* (4) is, again, a somewhat different example of the rule against dispositions made subsequently to the date of the will in cases where the will in terms leaves the property on trust, and shows that
- G the position may be different from the position where the will in terms leaves the gift absolutely. The trusts referred to, but undefined, in the will, must be described in the will as established prior to, or at least contemporaneously with, its execution. But there is a still further objection which, in the present case, renders the appellant's claim un-
- H enforceable : the trusts which it is sought to establish by parol evidence would be inconsistent with the express terms of the will. That such an objection is fatal appears from the cases already cited, such as *Re Huxtable, Huxtable v. Crawford* (8). In that case, an undefined trust of money for charitable purposes was declared, in the will, as in respect of the

whole corpus, and, accordingly, evidence was held inadmissible that the charitable trust was limited to the legatees' life, so that he was free to dispose of the corpus after his death. Similarly, in *Johnson v. Ball* (4), the testator by the will left the property to trustees, upon the uses contained in a letter signed "by them and myself": it was held that that evidence was not admissible to show that, though no such letter was in existence at the date of the will, the testator had made a subsequent declaration of trust; the court held that these trusts could not be enforced. LORD BUCKMASTER, in *Blackwell v. Blackwell* (2), at p. 331, described *Johnson v. Ball* (4) as an authority pointing:

to a case where the actual trusts were left over after the date of the will to be subsequently determined by the testator.

That, in his opinion, would be a contravention of the Wills Act. I know of no authority which would justify such a contravention. LORD BUCKMASTER also quotes, at p. 330, the grounds on which SIR JAMES PARKER, V.-C., based his decision as being both:

that the letter referred to in the will had no existence at the time when the will was made and that, supposing it referred to a letter afterwards signed, it is impossible to give effect to it as a declaration of the trusts since it would admit the document as part of the will and it was unattested.

In the present case, while cl. 5 refers solely to a future definition, or to future definitions, of the trust, that is expressed to refer to definitions subsequent to the date of the will, the sealed letter relied on as notifying the trust was communicated (as I find the facts) before the date of the will. That it was communicated to one trustee only, and not to both, would not, I think, be an objection: see the observation of LORD WARRINGTON in *Blackwell v. Blackwell* (2), at p. 341. But the objection remains that the notification sought to put in evidence was anterior to the will, and hence not within the language of cl. 5, and inadmissible simply on that ground, as being inconsistent with what the will prescribes.

It is always with reluctance that a court refuses to give effect to the proved intention of the testator. In the present case, it may be said that the objection is merely a matter of drafting, and that the decision in *Blackwell v. Blackwell* (2) would have been applicable if only cl. 5 had been worded as applying to trusts previously indicated by the testator. The sealed letter would then have been admissible, subject to proof of the communication and acceptance of the trust. This may be true, but the court must deal with the matter as in fact it is. It would be impossible to give effect to the appellant's contention without not merely extending the rule laid down in *Blackwell v. Blackwell* (2), but actually contravening the limitations which have been placed on that rule as necessarily arising from the Wills Act, and, in addition, from the fact that the conditions prescribed by the will cannot be contradicted.

The appeal must be dismissed and the decision of FARWELL, J., affirmed.

ROMER, L.J. : I agree, and have nothing to add.

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GREENE, L.J. : I agree.

Appeal dismissed, with costs. Leave to appeal to the House of Lords.

Solicitors : Preston, Lane-Claypon & O'Kelly (for the appellant);

B Field, Roscoe & Co., agents for Evershed & Tomkinson, Birmingham (for the respondent and for the trustee).

[Reported by C. M. YOUNG, Barrister-at-Law.]

C SOUTHERN ESSEX ASSESSMENT COMMITTEE v. BETTY & TOM, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 26, 1937.]

D Rating—Freight transport hereditament—Wharf—Premises forming part of dock undertaking—Industrial hereditament—Dock undertaking—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 5 (3).

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The respondents were the occupiers of a hereditament, consisting of storage bins, offices and premises, which adjoined premises occupied by manufacturers of fertilisers and artificial manures. By a lease of the respondents' premises granted to them by the manufacturers, the respondents were given rights of way between their premises and the highway to Barking. The respondents' premises were separated from the water front by the manufacturers' premises, which consisted, *inter alia*, of a wharf, in addition to their factory and plant for the manufacture of fertilisers. In terms of an agreement between the respondents and the manufacturers, the latter erected upon their premises and up to the distribution centre of the respondents, a conveyor, from which loading of materials held by the storage bins could be carried out into road transport vehicles. The goods landed at the wharf for transfer to the respondents' premises during one year constituted a considerable part of the total goods landed at such wharf. The respondents maintained that their premises were part of a dock undertaking, and were used wholly for docking purposes, whereof a substantial portion of the volume of business related to shipping and unshipping of merchandise not belonging to, or intended for the use of, the undertakers, the manufacturers, and that the hereditament ought to be entered and distinguished in the valuation list as a freight transport hereditament :—

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HELD : as the undertaking carried on by the manufacturers was an industrial undertaking, and not a dock undertaking, there was no dock undertaking of which the respondents' undertaking could form part, and, therefore, the respondents' premises ought not to be entered or distinguished in the valuation list as a freight transport hereditament.

[EDITORIAL NOTE. The decision here shows that a hereditament which is used with or as part of another undertaking cannot be entered upon the valuation

list as a freight transport hereditament, unless that undertaking is itself a freight transport hereditament.

AS TO FREIGHT-TRANSPORT HEREDITAMENTS, see HALSBURY Supp., Rates and Rating, para. 88; and FOR CASES, see DIGEST Supp., Rates and Rating, Nos. 226gg-226qq.]

SPECIAL CASE stated in accordance with the provisions of the Rating and Valuation Act, 1925, s. 31 (5). A

The appellants were the Southern Essex Assessment Committee, and the respondents were the occupiers of a hereditament situated in the borough of Barking and described in the valuation list for the borough as storage bins, offices and premises. On Jan. 28, 1936, the respondents duly made a proposal for the amendment of the list, that the hereditament should be entered and distinguished therein as a freight transport hereditament pursuant to the provisions of the Rating and Valuation (Apportionment) Act, 1928. The local rating authority duly gave notice of objection to the respondents' proposal, by notice dated Jan. 31, 1936. On Mar. 16, 1936, the appellant assessment committee heard the respondents' proposal, and the rating authority's objection thereto, and dismissed the proposal. Against this decision the respondents appealed to court of quarter sessions for the county of Essex. Upon the hearing of the appeal, the following facts were proved or admitted : B

(i) that the respondents were the occupiers of the hereditament, as lessees, upon the terms of a lease dated Dec. 16, 1933, granted by De Pass Fertilisers, Ltd., and which, with the plan therein referred to, was annexed to the case ; (ii) that, by the lease, the lessors granted to the respondents the rights of way between the respondents' premises and the highway to Barking ; (iii) that the respondents and the lessors entered into an agreement, dated Dec. 16, 1933, hereinafter referred to, pursuant to which the lessors provided certain facilities to the respondents ; (iv) that the lessors were manufacturers of fertilisers and artificial manures, and the occupiers of premises which adjoined those of the respondents and were entered in the valuation list as an industrial hereditament, and that the respondents' hereditament was separated from the water-front by the premises of the lessors, comprising, *inter alia*, a wharf, in addition to their factory and plant for the manufacture of fertilisers ; (v) that, in terms of the agreement, the lessors (a) duly erected upon their premises, and up to the distribution centre of the respondents, a conveyor, as shown in the photographs annexed to the case, and (b) duly provided the facilities ; (vi) that, shortly after Apr. 23, 1935, the whole of the interest of the shareholders in the respondent company was acquired by Amalgamated Roadstone Corporation, Ltd., which also, at about the same time, acquired a controlling interest in a number of other companies concerned in the production of road making materials ; (vii) that, prior to the date of the respondents' proposal, the C

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respondents had ceased to ship granite or other materials quarried at the respondents' quarries, and that, thereafter, the goods unloaded at the wharf and conveyed by means of the conveyor on to the respondents' premises consisted, for the greater part, of materials quarried

A and shipped by companies controlled by Amalgamated Roadstone Corporation, Ltd., and stored at the premises, in the course of fulfilling contracts entered into by such companies, with local authorities and other persons, for the delivery of road-making materials at sites referred to in such contracts, and that such materials, after being conveyed as

B aforesaid on to the respondents' premises, were tipped into the storage bins situated thereon, and, in due course, loaded upon lorries, and consigned or delivered to such respective sites; (viii) that the function of the bins was to hold materials whilst temporarily stored on the premises, before being loaded into transport waggons, and to facilitate such

C loading, which loading could be effected into road transport vehicles direct from the conveyor; (ix) that the goods landed at the wharf for transfer to the respondents' premises during one year constituted a considerable part of the total goods landed at such wharf.

The respondents contended that their premises were part of a dock

D undertaking, and were used wholly for docking purposes; that the lessors' premises, although occupied and used as an industrial hereditament, and entered in the valuation list as such, might equally be entered and distinguished, and were used, as a freight transport hereditament, and constituted a dock undertaking; that the respondents'

E premises were used in connection with the wharf, and as a part of a dock undertaking carried on thereon, being an undertaking whereof a substantial proportion of the volume of business was concerned with the shipping and unshipping of merchandise not belonging to or intended for the use of the undertakers; that the respondents had a

F right of way over the lessors' premises; and that the respondents' hereditament ought to be entered and distinguished in the said valuation list as a freight transport hereditament.

The appellants contended that the respondents had no right of way; that the respondents' premises were not used for docking purposes,

G as defined in the Rating and Valuation (Apportionment) Act, 1928, s. 5; that the respondents' undertaking was not a dock undertaking as defined in the said section, or a part of a dock undertaking, and that no merchandise was either shipped or unshipped at the respondents' premises; that the lessors' undertaking was an industrial undertaking,

H and their premises were properly described in the valuation list as an industrial hereditament, and that there was no dock undertaking of which the respondents' undertaking could form part; and that the respondents' premises ought not to be entered or distinguished in the valuation list as a freight transport hereditament.

The court of quarter sessions decided that the respondents' premises constituted a freight transport hereditament and should be assessed as such.

F. J. Tucker, K.C., and Paul Springman for the appellants.
Granville Sharp for the respondents.

LORD HEWART, L.C.J.: I am clearly of opinion that this appeal ought to succeed. The reasons for that opinion are in the contentions of the appellants as stated in the special case. Those contentions seem to me to be conclusive. With all due respect to those who have otherwise found, it seems to me that, upon the definitions contained in the Act, and the facts of this case, the contentions on behalf of the present respondents are quite untenable. I think, therefore, that the appeal ought to be allowed; that the decision of the court of quarter sessions should be reversed; and that judgment should be entered at quarter sessions for the Southern Essex Assessment Committee with costs; and that the finding that this hereditament of the respondents, Betty & Tom, Ltd., was a freight transport hereditament should be eliminated; and the requisite amendment made.

SWIFT, J.: I agree.

GODDARD, J.: I agree.

Appeal allowed, with costs.

Solicitors: *Blundell, Baker & Co.* (for the appellants); *Coburn & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

TAYLOR v. TAYLOR.

[KING'S BENCH DIVISION (MacKinnon, J.), January 22, 1937.]

Husband and Wife—Separation agreement—Payments without deduction of income tax—Arrears—Arrears exceeded by income tax which could have been deducted—Set-off.

In an action by a wife for the recovery of money alleged to be due to her under a separation agreement, the husband contended that the aggregate of the payments made exceeded the amount payable under the agreement after income tax, which he was entitled to deduct, had been deducted, and that he had therefore overpaid his wife, and that nothing was due to her. In fact the husband, when making payments under the agreement, never purported to deduct income tax and never gave to the wife any statement or certificate of deduction:—

HELD: as the amount of the income tax had not been deducted when the payments under the agreement were made, the husband was not entitled to set it off against the sum owing under the agreement.

[EDITORIAL NOTE. This case is not an action to obtain repayment of sums which should have been deducted in respect of tax, but an attempt to set them off against a claim for arrears of the periodic payments. It has long been settled that repayment cannot be enforced in law and the present case decides to the same effect the question of set-off in similar circumstances.

A FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, p. 237, para. 477; AND FOR CASES, see DIGEST, Vol. 28, pp. 72, 73, Nos. 381-391.]

Cases referred to :

(1) *Smith v. Smith*, [1923] P. 191; 28 Digest 68, 361.

(2) *Clack v. Clack*, [1935] 2 K.B. 109; Digest Supp.

(3) *Blount v. Blount*, [1916] 1 K.B. 230; 28 Digest 68, 356.

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ACTION by a wife for money due under a separation agreement. The facts are set out in the judgment.

I. H. Jacob for the plaintiff.

H. H. Maddocks for the defendant.

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MACKINNON, J. : This is an unhappy dispute between a husband and wife, arising under an agreement which was made between them that they should separate, and that the husband should pay to the wife the sum of £2 per week, payable every Thursday, the first payment to be made on Aug. 12 next after the date of the agreement. In addition to that, the agreement provided that :

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Whenever and while the amount of the husband's earnings shall reach the sum of £25 or upwards in any month, the husband will cause to be paid in manner aforesaid the additional sum of £1 per week.

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Certain payments from time to time have been made by the husband under that covenant, not, as I gather, regularly, or in any periodical amounts, but irregularly, and in uncertain amounts. The wife, the plaintiff, on May 3, 1935, issued the writ, claiming the balance due to her, namely, the amount which she says had not been fully paid according

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to the terms of that contract. During the period from Aug. 12, 1926, when they were to begin, until the date of the writ, payments at £3 per week would amount to £1,365, and payments at £2 per week would amount to £910. In fact the husband, by these various payments made from time to time, has paid the sum of £781 10s. It is apparent, there-

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fore, that he has in fact paid less than the full sum of £2 per week, and considerably less than the full sum if it was to be at the rate of £3 per week.

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Now, those figures are all admitted and agreed, but the defendant raises this point. He says that, by virtue of various authorities, such as *Smith v. Smith* (1), *Clack v. Clack* (2), and *Blount v. Blount* (3), he would have been entitled, when paying the £2 per week, to deduct from that payment the proper amount of income tax at the then current rate, and that would have been, according to his legal obligation under the deed, a sufficient payment of the £2 per week. He would have paid a less

sum, but, under the Income Tax Acts, the wife would have had to give him a receipt, if he demanded it, for the £2 per week in full; and it would also follow that some form of computation of the deduction of this tax would have been supplied to her, and that, if her income was less than the taxable amount, she could have recovered from the income tax authorities the tax deducted, and in that way, not being liable to pay income tax, she would ultimately receive the full £2 per week, part of it from her husband and the remainder from the income tax returned to her. Now the defendant says: "If you apply, to the making of the various payments that I ought to have made, the income tax that I might have deducted if I had paid these weekly payments subject to the deduction, the amount of that income tax is in excess of any sum which you, the plaintiff, can allege is the balance due to you. Therefore I have over-paid you, and therefore, at the date of this writ, nothing was due to you, and the action must fail." Now, I think that, if the defendant, in making these payments, had in terms made a deduction of income tax, he would have been entitled to do so. That is quite clear from the various cases; but I am quite satisfied that he never troubled his head about income tax, and it never occurred to him, and he simply sent the payments from time to time, and he did not go through the form of purporting to make any deduction, although no doubt on his own income he had in fact paid income tax. That is also very material for this reason, that, as the defendant never has deducted the tax in terms, and has never given the plaintiff any statement or allegation or certificate of having deducted the income tax from his payments to her, she is not now, and never has been, in a position to claim anything by way of return of income tax.

It is said that the defendant is now prepared to give some sort of certificate that, ever since 1926, he has been paying income tax, and therefore, I suppose, a payment he has made to his wife under this covenant ought to be deemed to be subject to the deduction of income tax. I very much doubt whether the income tax authorities would pay her back sums of money upon that, and I am quite satisfied that they would not do so having regard to the deduction or notional deduction as long ago as 1926 and 1927. The truth is, as I say, that the defendant never did make any deduction of income tax, and never intended to, and never thought about it at all, and in those circumstances I think that the cases cited by Mr. Jacob as to that are in point. The passage in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 17, p. 237, para. 477, to which he referred me was this, and it seems to be borne out by those cases:

The person making the payment is entitled *on making the payment* to deduct and retain thereout the tax thereon. The tax must therefore be retained from the payment at the time the payment is made, and if not so retained cannot as a general rule be retained out of future payments.

This is an attempt to retain it, and set it off as against the balance which has not been fully paid by the instalments already paid, and, in those circumstances, I think that the plaintiff is entitled to recover here, because she has not been fully paid her £2 or £3 per week, less income tax, and with the opportunity of getting the balance of it from the income tax authorities. Then the question is, what is she entitled to ? At £2 per week, the sum paid is less than the sum to which she would have been entitled by £128 10s. I have heard the defendant, and he admits that, in the course of this period, there were seven months in which his income did reach £25, and, taking a month as four weeks, that is 28 weeks for which she is entitled to £3 instead of £2. The result is that she is entitled to recover £156 10s.

Solicitors : *Jacques, Asquith & Jacques* (for the plaintiff) ; *Montagu's and Cox & Cardale* (for the defendant).

[*Reported by J. MACGILLIVRAY ASHER, ESQ., Barrister-at-Law.*]

TURNER v. COURTAULDS, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 20, 1937.]

Factories and Workshops—Factory—Addition to switchboard—Not handed over by contractor as complete—Responsibility of owner as “occupier.”

The respondent company was charged, as occupier of a factory, which was subject to certain regulations made in pursuance of the Factory and Workshop Act, 1901, s. 79, for the generation, transformation and distribution and use of electrical energy, with having neglected to observe a certain provision of the regulations, in that, certain work having to be done on a switchboard for high pressure situated in the power-station, the company failed to make dead the switchboard, contrary to the requirements of the regulations, and that, in consequence of such neglect, a workman was killed. The work on the switchboard was being carried out by another company, and at the time of the accident the work had not yet been completed nor had the switchboard been handed over in working order to the respondent company. The justices dismissed the charge, on the ground that in the circumstances the respondent company was not the occupier within the meaning of the Act at the time of the accident :—

HELD : (i) as the object of the switchboard was to control the distribution of extremely powerful electrical energy which came from the respondent company's power-house, the respondent company was the occupier, within the meaning of the Act, and was therefore guilty of the offence with which it was charged.

(ii) as the switchboard in question was not a “ machine or implement moved by steam, water or other mechanical power,” within the meaning of sect. 142 of the Act of 1901, that section was of no avail to the respondent company.

[EDITORIAL NOTE. The main point in question here is who is the occupier of a factory for the purposes of the Factory Acts. Where a small addition to the switchboard is being made and has not been handed over to the owners of the

factory, they are in law the occupiers and not the contractors who are erecting the addition.

AS TO OCCUPIER, see HALSBURY, Hailsham Edn., Vol. 14, p. 573, para. 1090 ; and FOR CASES, see DIGEST, Vol. 24, p. 904, No. 44 *et seq.*

APPEAL by way of case stated against a decision of the justices sitting A at Coventry police court.

The respondent company was at all material times the owner of premises in Coventry, where it carried on business as manufacturer of artificial silk. Part of the premises consisted of a building known as the power-house, wherein electrical energy was generated and distributed at 2,000 volts 2 phase. In the power-house there was a switchboard within the meaning of, and the definition contained in, the regulations for the generation, transformation, distribution, and use of electrical energy in premises under the Factory and Workshop Acts, 1901 to 1911. At the top of, and running along the entire length of, C the switchboard, in a totally enclosed place, there were two copper conductors, called "busbars," connected with the generators in the power-house and conveying the electrical current from the generators to the switches on the switchboard. The switchboard was made up of a number of sections, each consisting of a cubicle containing isolating switches and oil circuit breakers in different compartments therein, the latter being operated mechanically and remotely by switches on panels situated a few feet from the corresponding cubicles. Between D the cubicles and panels there was a passage, a few feet wide, running the entire length of the switchboard. In or about Aug., 1935, the British Thomson-Houston Co., Ltd., which had supplied to the respondent E company the electrical equipment in the power-house, in accordance with instructions received from the respondent company, made certain extensions, and was engaged, under a written contract, in erecting certain new equipment in the power-house, including an additional F section to the switchboard. For that purpose, the British Thomson-Houston Co., Ltd., provided both the material and labour, and was not under the control or authority of the respondent company. At the top of the cubicle, and beneath the busbars, there was a compartment containing an isolating switch, into which compartment two terminals, G connected with the busbars, projected. When the generators were working, both the busbars and the terminals were live. The isolating switch was operated by means of a detachable handle, used to turn a spindle projecting through the front of the isolating switch compartment, and its function was to make dead the oil circuit breaker compartment H hereinafter mentioned in the said cubicle. Prior to the evening of Apr. 10, 1936, the additional section to the switchboard had never been put into use. The additional section, although completely erected and furnished, had not been passed or approved by the

respondent company, because it found that it was not in working order. In the cubicle, directly below the isolating switch compartment, there was an oil circuit breaker compartment, containing an oil circuit breaker connected with the isolating switch above and operated by

A means of a switch on the panel situated a few feet from the cubicle. When the isolating switch in the cubicle was off, the oil circuit breaker compartment and all apparatus therein contained were dead. The fronts of both compartments were fitted with metal covers, which, in addition to the safety devices hereinafter described, were held in position by a

B padlock, to prevent access being obtained thereto by unauthorised persons. In addition to the padlock, the cover to the oil circuit breaker compartment was held by two externally operated catches and two internal catches, and could not be opened unless and until the switch on the panel was put into the "off" position, when a castel key was

C automatically released, which key was required to undo a lock on the spindle of the isolating switch, which lock held the internal catches in position. The lock could not be opened unless and until the isolating switch was in the "off" position, nor could the isolating switch be operated whilst the lock was open. On and during Apr. 10, 1936, certain

D employees of the British Thomson-Houston Co., Ltd., including one George Graysmark, an electrical-fitter, were engaged in the powerhouse carrying out certain work under the instructions of one Wilcox, a foreman electrical engineer in the employ of the British Thomson-Houston Co., Ltd., and by that company appointed in charge of the

E contract. Graysmark, who did not have, and was not expected to have, any technical electrical knowledge, had, during the course of the day, completed certain work on the switchgear in the oil circuit breaker compartment of the cubicle, and the cover of the compartment had been removed for such purpose, but had been replaced and locked in position when

F the work had been completed. When Graysmark was engaged in the work, the isolating switch was off, and the oil circuit breaker compartment and all apparatus contained therein were dead. Graysmark had done no work on the isolating switch compartment, nor had the cover been removed therefrom. Graysmark worked under the instructions

G and/or orders of Wilcox, and was never permitted to work on live apparatus. The respondent company had given instructions to the engineer of the British Thomson-Houston Co., Ltd., supervising the work, that the switchgear on the additional section of the switchboard was to be ready for use by the respondent company by 8 p.m. On the

H same day, and at about 9 p.m., one Pittaway, a foreman electrician employed by the respondent company, gave instructions to one Seed, a shift electrician employed by the respondent company, to put into operation for the first time the switchgear on the additional section of the switchboard. Pursuant to these instructions, Seed attempted to close

the isolating switch on the cubicle, but, being unable to do so, was ordered by Pittaway to remove the covers of both the oil circuit breaker compartment and the isolating switch compartment to ascertain why the switch would not close. Thereupon Seed, in the presence of Pittaway, unlocked the padlock and removed the covers, and discovered that the contacts at the bottom of the isolating switch compartment were out of alignment, thus preventing the blades of the isolating switch from entering them. When the covers of the isolating switch compartment had been so removed, the terminals of the conductors therein connecting with the busbars were exposed and live. For the purpose of re-aligning the isolating switch terminals, it was unnecessary and wrong and dangerous, as Wilcox and Graysmark well knew, to interfere with, or handle in any way, the terminals in the isolating chambers while any of those terminals were alive. The defect was thereupon pointed out by Pittaway to Graysmark, who was engaged in other work elsewhere in the power-house at the time, but was at that moment fetching a tool from the vicinity of the switchboard. Graysmark replied that he would put the matter right, and, having procured some steps, began to adjust the contacts in question in presence of Pittaway and Seed. Having aligned the contacts, by adjustments from the switch chamber and by eye, Graysmark proceeded to test his adjustments, without first replacing the cover, in the only practical manner possible, namely, by operating the isolating switch; and, with such end in view, having turned the lock on the spindle of the isolating switch with the castel key, he attached the handle to the end of the spindle to turn on the isolating switch, and did so. With his left hand still on the handle, he put his right hand into the isolating switch compartment and upon one of the contacts, whereupon there was a flash and Graysmark fell to the ground, having received an electric shock from the effects of which he died within 20 minutes. If the switchboard had been made dead before Pittaway had caused the covers to be removed, the accident would not have occurred.

The appellant contended that the respondent company had neglected to ensure that the busbar terminals in the isolating compartment of the cubicle were made dead before Graysmark did any work thereon.

The respondent company maintained that it was not the occupier of the additional section of the switch cubicle at the time of the accident, as the British Thomson-Houston Co., Ltd., had not finished working on this part of the switch cubicle, nor had it handed over the same to the respondent company in working order.

The justices accepted the contentions on behalf of the respondent company, and dismissed the information, and this appeal was thereupon brought.

Valentine Holmes for the appellant.

F. van den Berg, K.C., and *Harold Eaden* for the respondent company.

LORD HEWART, L.C.J.: In my opinion, this appeal ought to succeed. It is not necessary to repeat the facts which are so fully, and, if I may say so, interestingly, stated in this case. The respondent company was charged under the Factory and Workshop Acts and the regulations made thereunder, and in particular sect. 79 of the Act of 1901, for failing to make dead a certain switchboard upon its premises. The result of what was done was that a man came into contact with a live terminal and in a few minutes died from the electrical shock. The justices have come to the conclusion that, in the circumstances, the respondent company was not liable, inasmuch as the justices held that it was not the occupier of the particular part of the factory where this man was at the time. Now, it is a little important to observe in the findings of fact that the justices have found that the respondent company was, at all material times, the owner of the premises in Coventry where it carried on business as a manufacturer of artificial silk, and those premises are a factory within the meaning of the statutes. Part of those premises, it is found, consisted of a building known as the power-house, where electrical energy was generated and used for lighting and working the machinery. It was generated throughout the factory at 2,000 volts. In that power-house there is a switchboard which regulates and controls the distribution of electrical current to all the factory. That is made clear in the finding, that, if the switchboard were made dead, the whole of the factory would be brought to a stop. The isolating switch compartment, in the words of the case :

cannot be made dead unless and until the said busbars are made dead, which cannot be done without closing down and/or ceasing work in the whole of the said factory.

Now, it was in that vital and controlling part of the factory as a whole that some work had lately been done, and some addition was in course of being made. The justices, no doubt moved by the feeling that it was a little hard on this particular company that it should be liable for what had happened, allowed themselves to be persuaded that the company was not the occupier of what is called the "additional section of the said switch cubicle." Now, the British Thomson-Houston Co., Ltd., had not finished working on this part of the cubicle, nor had it handed it over in working order. Therefore, it was said, the British Thomson-Houston Co., Ltd., and not the respondent company, was the occupier, and it was the British Thomson-Houston Co., Ltd., and not the respondent company, who should have seen that the regulations were complied with. I know that the findings of the justices, at first blush, has an attractive air, because they thought it was hard upon the respondent company to be hit, but it is to be observed that this little compartment in itself consisted of wood and metal, and perhaps earthenware fittings, but the whole object of it is to control the distribution of extremely

powerful electrical energy which comes from the company's powerhouse. Upon that, the company was unfortunate in this particular accident, but it cannot get rid of its responsibility. It was making an additional section to the switchboard.

The learned counsel who ingeniously argued this case on behalf of the respondent company was driven to the Factory and Workshop Act, 1901, s. 142. We were told that that section was brought to the notice of the justices below. How much they thought of it can be gathered from the fact that they do not put a word of it in the case stated. Now, sect. 142 appears to me to be dealing with a wholly different matter from what is concerning us to-day. That section provides that:

Where in a factory the owner or hirer of a machine or implement moved by steam, water, or other mechanical power is some person other than the occupier of the factory, the owner or hirer shall, so far as respects any offence against this Act committed in relation to a person who is employed in or about or in connection with that machine or implement and is in the employment or pay of the owner or hirer, be deemed to be the occupier of the factory.

In order to get, or attempt to get, any assistance from that section, it has to be argued on behalf of the respondent company that this particular section of the switchboard was a machine or implement moved by steam, water, or any other mechanical power. That is the kind of argument which was not put forward, except for controversial purposes. It is quite obvious that this switchboard, or this portion of the switchboard, has not the function of moving at all. Its business is to be stationary, and to regulate the distribution of electrical current elsewhere and otherwise produced. It seems to me impossible to contend, even for the purpose of argument, that this section of the switchboard was a machine or an instrument, or was moved by steam, water, or other mechanical power. That seems to me to be manifestly something quite different. The justices also accepted the contention here that the respondent company is not guilty of any negligence, but, as is common ground, that is a topic which, upon this information, does not arise. It was an irrelevant contention. The conceivable hardship which may arise is obvious, but hard cases make bad law, because they tempt people to accept bad arguments which would be repudiated by intelligence.

In my opinion, these justices came to a conclusion which cannot be supported, and I think that this appeal ought to be allowed.

SWIFT, J.: I agree. In order that he could succeed in his argument, Mr. van den Berg was obliged to rely upon the Factory and Workshop Act, 1901, s. 142. Unless he can show that this section of the switchboard was in the occupation of somebody other than the present respondent company, he has no answer to the summons. In my opinion,

he cannot rely on sect. 142. I doubt very much whether this was an implement, and I am certain that it was not a machine. It certainly did not move, nor did it work as being actuated by steam, water, or other mechanical power. To bring the switchboard within sect. 142
 A completely fails, and I think the case ought to go back to the justices with a direction that the offence which was charged is proved.

GODDARD, J. : I agree.

Appeal allowed, with costs. Case remitted back to the justices with a
 B *direction that the offence charged is proved.*

Solicitors : *Treasury Solicitor* (for the appellant) ; *Andrew, Purves, Sutton & Creery* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

C

PRATT v. LONDON PASSENGER TRANSPORT BOARD. GREEN v. VANDEKAR.

[COURT OF APPEAL (Greer, Slesser and Scott, L.JJ.), **January 19, 1937.**]

D

Practice—Deceased person interested in action—Appointment of person to represent his estate—Necessity for consent—R.S.C., Ord. 16, r. 46.

E

In the first case the defendants in an action for personal injuries attributed the blame to a third person, who had since died. He left no estate, but he had been insured against such claims for negligence by an insurance company. The plaintiff applied under R.S.C., Ord. 16, r. 46, for an order that the Official Solicitor should represent the deceased's estate and be added to the record as a defendant. The order asked was made without the consent of the Official Solicitor. In the second case, the facts were similar, except that the deceased was one of the defendants in the action, and that the order was made without the knowledge of the Official Solicitor. The Official Solicitor appealed in both cases :—

F

HELD : there is no power under R.S.C., Ord. 16, r. 46, to appoint a person against his will to represent the estate of a deceased person.

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[**EDITORIAL NOTE.** These appeals show clearly the present position in a running down action where the negligent person has died and it is desired in effect to recover the damages from his insurance company. R.S.C., Ord. 16, r. 46, seems to provide a procedure where there is already an action in being, but this is now shown to be subject to the party appointed to represent the deceased giving his consent. This is necessary owing to his liability for costs. The other remedy would appear to be to apply for a grant of administration *ad litem*, a procedure which would be available where the action had not yet been commenced. The same necessity for consent would appear to apply in this case. The matter, as the court

H

suggests, is one that in the interests of the public should be dealt with by legislation. As to R.S.C., ORD. 16, R. 46, see HALSBURY, 1st Edn., Vol. 23, Practice, p. 103, para. 182; and FOR CASES, see DIGEST, Practice, p. 445, Nos. 1347, 1348. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 246, 247.

AS TO A GRANT *ad litem*, see HALSBURY, Hailsham Edn., Vol. 14, p. 275, para. 486; and FOR CASES, see DIGEST, Vol. 23, pp. 209-215, Nos. 2484-2555.]

Cases referred to :

- (1) *Re Curtis & Betts*, [1887] W.N. 126 ; 23 Digest 213, 2516.
- (2) *Moore v. Morris* (1871), L.R. 13 Eq. 139 ; 23 Digest 209, 2485.
- (3) *Curtius v. Caledonian Fire & Life Insurance Co.* (1881), 19 Ch. D. 534 ; 23 Digest 213, 2523.
- (4) *Watts v. Official Solicitor*, [1936] 1 All E.R. 249 ; Digest Supp.
- (5) *Bruiton v. Birch* (1853), 1 Eq. Rep. 136 ; 23 Digest 213, 2521.
- (6) *Cox v. Taylor* (1853), 1 Eq. Rep. 122 ; 23 Digest 213, 2520.
- (7) *In the Estate of Simpson*, *In the Estate of Gunning*, [1936] P. 40 ; Digest Supp.

APPEALS from an order of HORRIDGE, J., dated Nov. 11, 1936, and from an order of HILBERY, J., dated Nov. 16, 1936. The facts in the cases are set out in the judgments.

The Solicitor-General (Sir Terence J. O'Connor, K.C.) and Theodore Turner for the appellants.

Alban Gordon for the respondent Pratt.

Alban Gordon and Neville Tacey for the respondent Green.

The Solicitor-General : These appeals deal with a situation which arises in many cases where the deceased person leaves no assets except a claim for indemnity against an insurance company. It is of no advantage to anyone, except the plaintiff in each case, to take out letters of administration. Connitt has no executors or administrators. This procedure is a source of embarrassment to the Official Solicitor ; he has no claim against the insurance company ; he is not an administrator nor a legal personal representative. R.S.C., Ord. 16, r. 46, is not the correct procedure and was not intended to deal with such a situation ; the plaintiff should go to the Probate Court and ask for a limited administrator *ad litem* to be appointed. Such an administrator would be secured as to costs and would not be liable for negligence ; he would stand in the shoes of the deceased and could bring a claim against an insurance company. Unless someone is appointed, no one can claim from the insurance company. The orders cannot stand as they are at present ; under R.S.C., Ord. 16, r. 46, there must be consent ; here the Official Solicitor has been brought in without his consent, and with no security for his costs. [Counsel referred to *Moore v. Morris* (2), *Bruiton v. Birch* (5), *Cox v. Taylor* (6), *Re Curtis and Betts* (1), *In the Estate of Simpson* (7), *Watts v. Official Solicitor* (4).]

Gordon : The Official Solicitor consented to act provided that his appointment was made by the Probate Division and provided that his costs were paid. There is no question about his costs ; the plaintiff is able and willing to give a full indemnity for costs. It was never suggested in *Watts v. Official Solicitor* (4) that R.S.C., Ord. 16, r. 46, is not a suitable procedure in these cases.

GREER, L.J. : The question in these appeals arises in the following manner. In *Pratt v. London Passenger Transport Board* the plaintiff

- brought an action for damages for negligent driving by a servant of the London Passenger Transport Board, who, not content with pleading that there was no negligence on the part of their servant, went further and pleaded that the negligence was the negligence of a Mr. Connitt,
- A who was concerned in the collision, being the driver of the vehicle which in some way or other was alleged to be responsible for the accident which resulted in the damage to the plaintiff. Now, unfortunately Mr. Connitt died, and therefore, as he was a person apparently interested in the result of the litigation, he was entitled, I suppose, to be present at
- B the hearing of the case and state his point of view, state his argument and prove his facts to show that the allegation that he was responsible was not true. It is a little odd, because he was not a party to the litigation at all. He had not been made a third party by the Transport Board. He was not in any way a party to the litigation, and I doubt
- C whether, without the consent of the court, he could have been allowed to take part in the trial at all, but probably he would have been allowed to take part in the trial as there was an express allegation made against him by the defendants to the action, and it was desired by the plaintiff that there should be somebody to represent his estate, he not having
- D survived. The position as regards claims against the estate has been altered by a recent Act, the Law Reform (Miscellaneous Provisions) Act, 1934, which enables an executor or somebody representing the estate to bring an action for the damages that could have been recovered by the deceased person. Thereupon the position of a plaintiff, or of a
- E defendant for that matter, in making a claim against the third party is that there may be one of two different kinds of proceedings brought. One is under Lord Campbell's Act. In that a plaintiff, or a person in the position of a plaintiff, may bring an action for the pecuniary loss that has been sustained by reason of the death of the deceased. In that
- F action there need not be an administrator at all, because one of the dependants is allowed to bring the action, but under the recent Act, in order to give effect to the claim that may be made by a deceased person or by a plaintiff against a deceased person, the action can only be brought by some representative of the deceased or against some representative
- G of the deceased. Now what is to happen if the position is that he has not got a representative and there is no likelihood of his having any representative unless some order is made by the court? That matter is now dealt with by R.S.C., Ord. 16, r. 46, which gives the court power to make an order; it does not compel the court to do so. It says:
- H If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice [then the notice is specified] and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the

same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

Now, if the deceased person is somebody who would have had to incur expense in the litigation, his representative will necessarily have to incur expense in the litigation, and the court may well think that this is not a proper case in which to make an appointment of the Official Solicitor, or anybody else who may be considered suitable for the appointment under the provisions of the rule, without his consent. It seems to me quite impossible to suppose that this rule applies without the consent of the person who may have to be acting in the litigation and incurring expense in doing so, which may be partly disbursements or, if it is the Official Solicitor, his time and expenses as solicitor. It is impossible to suppose that the rule or the section in the Act affecting only the Chancery Division should apply where there is no consent on the part of the person on whom the liability is imposed, and it does not follow, because the plaintiff offers an indemnity, that that is sufficient to justify the Official Solicitor taking up the position he is asked to take up, because it may well be that he would not be satisfied with that indemnity, and in any event he would be liable in the first instance to incur the expenses of the litigation and then might have to take proceedings for his indemnity. I think it is right, apart from authority, that this rule does not apply except in the case of the consent of the person who is put forward as the person to be appointed to represent the estate of the deceased. There is authority in the case of *Re Curtis and Betts* (1) for that statement of the law, if authority be needed, but I think it jumps to the eye that it was not intended to do the injustice, which it is suggested it might cover, that it would bring about if anyone was appointed without his consent. Therefore the appeal necessarily succeeds, because there was no consent in this particular case by the Official Solicitor.

The other point that was argued—I think it was only suggested in the early stage of the argument for the appellant—was that this rule and the statutory provision did not apply in a case where what was wanted was a representative of some party to the litigation. In the second appeal, *Green v. Vandekar*, the person for whom a representative was to be appointed was directly a party to the litigation, namely, one of the defendants. I gather the learned Solicitor-General was not prepared to go to the length of saying that the words of R.S.C., Ord. 16, r. 46, were not wide enough to cover an appointment by a judge in chambers in charge of the case. I think they are clearly wide enough for an appointment by him, because the rule is in these words :

If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may—

and then it goes on to describe what they may do. It is quite clear in both these cases that there was a cause or matter or some proceeding,

and it was made to appear to the court or a judge that a deceased person in the matter in question had no legal representative. Those are the conditions for the power of the court to make either an order that they shall proceed without any representative or that some representative shall be appointed. I think the authorities ought to have been fatal to the application for the appointment of the Official Solicitor. He did not consent. The fact that he would have been willing to consent to some other form of proceeding in the Probate, Divorce and Admiralty Division does not seem to be really relevant. He did not consent to the order which the learned judge was asked to make. For these reasons I think the appeals must necessarily succeed.

We were invited to make observations with reference to what ought to be the general rule for the court or a judge when applications are made to them in exercising their discretion under R.S.C., Ord. 16, r. 46. For my part I think it unwise to lay down any general rule with regard to a matter which is a matter for discretion, because no two cases are the same. It may be that in some cases it would be held to be clearly inconvenient to make an order under this rule, whereas in other cases it might appear to be an adequate and proper method of dealing with the difficulty. I do not think we can, in advance, lay down any rule as to how the discretion should be exercised in these cases. It is unfortunate, as I have no doubt the main object of these appeals is to give some assistance to the Official Solicitor as to decisions in the future when he is asked to represent a deceased person. It seems to me, therefore, that the appeals are right and succeed. In neither case does the learned Solicitor-General ask for an order as to costs ; therefore the appeals will be allowed without costs.

SLESSER, L.J. : I am of the same opinion. R.S.C., Ord. 16, r. 46, does not say whether the court or judge, if the court is of opinion that a person ought to be appointed, may appoint a person *in invitum* without having obtained from that person his consent to represent the estate, but, in my opinion, it would be contrary to all principles of justice, and indeed contrary to decided authority, such as there is, to hold that that power to appoint such person to represent the estate could be made against the will and without the consent of the person sought to be appointed. Authority, if authority be needed for such a proposition, is to be found in the case of *Re Curtis and Betts* (1), where the court, COTTON, BOWEN and FRY, L.JJ., said this among other matters, at p. 127 :

It was also wrong to appoint to represent an estate a person who was unwilling to act.

In so far as we are told, and it is undisputed in the present case as regards these proceedings, whatever may have been the fact with regard to

contemplated proceedings in the Probate Division, that the Official Solicitor declined to consent, it follows that the learned judges, in making these orders appointing him to represent the estates of the respective deceased persons in these two cases and adding him in that capacity to the record in the first case as a defendant, were acting without jurisdiction, A and the learned Solicitor-General is right in saying that these appeals should for that reason be allowed. As my Lord has said, the matter has travelled rather outside that particular ambit. We were asked to say, as I understood the argument, in addition to holding that that want of consent was a defect fatal to the making of the order, that when the scope of this order and its history is rightly considered, it should not properly be applied to a case like this at all. It is quite true that, as a matter of history, this order finds first expression or early expression in the Chancery Procedure Act, 1852, s. 44, and it was there placed, as appears from the commentary in DANIELL'S CHANCERY PRACTICE, as a substitute for administration in certain cases of dispute in property. C The passage to which I refer, which is contained in the 8th Edn., Vol. I, pp. 155 and 156, is to this effect :

Where a claim on property in dispute would vest in the personal representative of a deceased person, and there was no general personal representative of that person, an administration, limited to the object of the suit, was formerly necessary to enable the court to proceed to a decision on the claim ; but now the court may, if it thinks fit, in any cause, matter or other proceeding, appoint a person to represent the estate, or proceed in the absence of any such representative. D

That was undoubtedly the position before the Judicature Act, limiting such question, as appears from the cases and from the nature of the matters to be considered, to disputes about title to property and the like. E In that connection in *Moore v. Morris* (2), LORD ROMILLY, M.R., said, at p. 140, that he had frequently to consider that question in chambers and held that the section did not apply in three cases :

First, where the estate of the deceased person is that which is being administered in the suit ; secondly, where the interest of the deceased person is adverse to that of the plaintiff ; thirdly, where the representative of the deceased person has active duties to perform. F

Since the Judicature Act the power which there appears to be given would without qualification extend, in my view, to common law as well as chancery proceedings, and generally speaking, it does appear to me that, as appears in the case of *Curtius v. Caledonian Fire and Life Insurance Company* (3), in the language of BAGGALLAY, L.J., at p. 537 : G

The 44th section has conferred on the court the power of dispensing with the presence of a legal personal representative in certain cases. H

It was said in the same case by LORD COLERIDGE, C.J., at p. 536 :

No doubt some of the judges have found fault with orders which have been made in particular cases, but although one judge takes a different view from another on a particular case before them, that is a different thing from holding that there was no jurisdiction.

A The matter appears to me, therefore, to be one of discretion, but I would finally add this matter for consideration, that in a very recent case, *Watts v. Official Solicitor* (4), it does appear that, the Official Solicitor having consented to be appointed a representative under R.S.C., Ord. 16, r. 46, an order had been made without any question in circumstances raising questions entirely of common law principle very similar to those which obtain in the cases now under consideration. It may be said, and has been said, that that case was treated throughout as one in which, once the consent of the Official Solicitor had been given, B the question of jurisdiction to make the order was not raised by anybody at all. Therefore it is not a concluded authority on the subject, but it does appear that throughout the case the court treated the jurisdiction as open, and I think it would be unfortunate if, after so short a lapse of time, the capacity of the court, although the matter was not fully argued C in that case, to make the order which was there made could be thought open for rebuke. Beyond that I think it is inexpedient to give any concluded view now as to the respective powers given under R.S.C., Ord. 16, and the administrative powers which may be sought to effect a similar object under the Administration of Justice Act, 1928, s. 9, as amending D the Administration of Justice Act, 1925, s. 162. I do not think those matters arise for consideration in the present case. It is enough to say that here on the face of it a consent which is necessary was not given, and that, in my view at any rate, had it been given it would have been competent for the Official Solicitor to have acted had he been appointed E by the court with consent, and that the court would have jurisdiction to make that order.

F SCOTT, L.J.: These appeals have touched upon certain important questions of public policy arising out of recent legislation in regard to the rule that a personal action dies with the death of the person and in regard to the subject of the rights of plaintiffs against insurance companies with regard to substantial motor accidents on our roads. I express no opinion at all as to what is the appropriate remedy with regard to those matters, because that is not the business of a court and G not before us, but I recognise that the question before the court here is one of great importance in order that the authorities concerned may consider what steps, if any, should be taken in regard to those matters of policy. The only question before the court, as I conceive it, is whether an order can be made under R.S.C., Ord. 16, r. 46, appointing a person H to be a representative of the estate of the deceased person, where that person so appointed does not consent to his appointment. In my view it is impossible to apply the rule where that consent is not given, and I think the decision of this court cited by SLESSER, L.J., *Re Curtis and Betts* (1) is direct authority for that proposition. It has been suggested

in the course of the argument that possibly the same result as was intended by the order in this case under r. 46 might be achieved, and more successfully achieved, by an order of the Court of Probate for a limited administration *ad litem* and the appointment of a limited administrator for that purpose. That question again is not before the court, and I therefore express no opinion as to whether such an order could properly be made, but in my view for practical purposes neither one nor the other is possible without consent, and therefore no procedure can regularly be employed unless a person is willing to consent, and he will not consent in a normal case unless he is protected adequately against the financial risks involved in his appointment for the purpose of litigation. In other words, the opportunities available for adopting either the one procedure or the other, that is, under r. 46 or the procedure of the Probate Division, will be exceedingly limited. If that is so, the result of our decision must necessarily be that a practical question will arise frequently in a very concrete form of its being impossible to proceed with the litigation for the ultimate purpose of getting payment out of the insurance company, which has taken the liability to third parties of a defendant who is responsible in law for causing injuries and then dies. Therefore the practical decision is that in this court all we can say is that the order was an order which ought not to have been made, and that the question is a matter for consideration from the point of view with which this court is not directly concerned.

There is only one other observation I desire to make, and that is this. We have been referred to the particular terms of r. 46 and of its predecessor, from which it is directly descended, the Chancery Procedure Act, 1852, s. 44. In the rule it is provided :

If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative—

two courses may be adopted. Sect. 44 of the Act of 1852 contained similar words at the commencement of the section, but at the end of the section there were words, which are not present in the rule, which throw light upon the meaning of the word “interested.” At the end of the section it says :

The order so made by the said court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person—

as in the rule. Then it goes on :

and such legal personal representative had been a party to the suit or proceeding, and had duly appeared—

that is in effect put into the rule. Then follow these words :

and submitted his rights and interests to the protection of the court.

Those words seem to indicate that it is as a plaintiff that his joinder in the suit is contemplated, rather than as a defendant. I express no opinion as to whether the rule can be applied at the expense of the plaintiff where the appointment is desired for the express purpose of enforcing a claim against the person so added to the suit. Subject to those observations, which involve no difference of opinion with the other members of the court, I agree that these appeals succeed.

Solicitors: *Official Solicitor* (for the appellant); *Spiro & Co.* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Applied. DUDLEY AND DISTRICT
BENEFIT BLDG. SOC. v. EMERSON.
[1949] 1 All E.R. 691.

IRON TRADES EMPLOYERS' INSURANCE ASSOCIATION v. UNION OF HOUSE AND LAND INVESTORS, LTD.

[CHANCERY DIVISION (Farwell, J.), January 20, 1937.]

Mortgage—Power of leasing—Restriction—Consent of mortgagee—Lease created without consent—Whether mortgagees entitled to regard themselves as no longer bound by their own covenants—Common law power of leasing—Law of Property Act, 1925 (c. 20), ss. 99, 152.

A mortgage contained the usual restriction upon the mortgagors' statutory leasing powers that such powers should not be exercised without the previous written consent of the mortgagees. The mortgagors also bound themselves if required to furnish to the mortgagees' solicitors a list of lettings every six months. The mortgagors entered into a tenancy agreement without such consent, and the mortgagees contended that the entering into such tenancy agreement was a breach of the covenant, and further that it released them from a covenant on their part not to call in the mortgage for a period of ten years:—

Held: (i) the mortgagees, besides their statutory power of granting leases binding on the mortgagees, had a common law power of granting leases not binding on the mortgagees, and, as the tenancy agreement did not purport to be made under the statutory power or to be binding upon the mortgagees, there was no breach of the covenant.

(ii) the covenant by the mortgagors upon request to supply details of lettings included lettings under their common law powers.

(iii) the only effect of the covenant restricting the statutory power of leasing was that the tenancy agreement was in no way binding upon the mortgagees.

(iv) the Law of Property Act, 1925, s. 152, did not make the tenancy agreement binding on the mortgagees or one validly granted in exercise of the statutory power.

[EDITORIAL NOTE.] This case carefully considers the effect of a covenant by a mortgagor not to grant leases under the statutory power without the previous written consent of the mortgagee. Shortly put, the result is that a covenant that refers particularly to the statutory power does not affect the common law power of leasing, and any lease granted by the mortgagor, though not binding on the mortgagee, is a valid lease as between the mortgagor and the tenant. There is no breach of covenant, and no question arises of the release of the mortgagee from his covenants, e.g., one to allow the mortgage to be outstanding for a period of 10 years. Though the point is not noticed in the judgment, it seems nevertheless to be true that,

Dictum of FARWELL, J., at p. 484, approved. DUDLEY & DISTRICT BENEFIT BLDG. SOC. v. EMERSON. [1949] 2 All E.R. 259.

since the alteration in the nature of a mortgage in 1925 whereby the mortgagor retains a legal estate in the property, a lessee from the mortgagor in the exercise of his common law power of leasing will now get a legal estate in his term of years. He will, of course, always be subject to ejectment by the mortgagee, so long as the latter has not recognised his tenancy. The practical result of the present case is that if it is desired to deprive the mortgagor of every power to grant leases, the usual restriction must be extended beyond the statutory power. A

AS TO LEASING POWERS OF MORTGAGORS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 330, 331, para. 494; and FOR CASES, see DIGEST, Vol. 35, pp. 334, 335, Nos. 768-775.]

ACTION for a declaration that the execution of a tenancy agreement by the defendants was a breach of a covenant contained in a mortgage dated Oct. 1, 1935, and made between the plaintiffs and defendants, and for other relief. B

The defendants on Oct. 1, 1935, mortgaged certain properties to the plaintiffs to secure the repayment of £19,700 and interest thereon, and the defendants entered into the usual covenant restricting the statutory power of leasing. The relevant parts of the deed, which was in form a legal charge, and the sections of the statute conferring such powers of leasing, are set out in the judgment. On Oct. 8, 1935, the defendants entered into a tenancy agreement whereby they let part of the property comprised in the security upon a yearly tenancy. The tenancy agreement did not purport to be made under the statutory power of leasing nor to be binding upon the plaintiffs. The plaintiffs claimed a declaration that (a) the tenancy agreement was a breach of the covenant in the mortgage; (b) the defendants had failed to deliver a counterpart of the agreement pursuant to the Law of Property Act, 1925, s. 99 (11); (c) the defendants were not entitled to grant leases or accept surrenders without the previous written consent of the plaintiffs. There was also a claim for an injunction to restrain the granting of lease and for an order for delivery up of a counterpart of the tenancy agreement. D E F

The defendants admitted the facts, but denied all the allegations of the plaintiffs. They, however, without admitting any legal obligation to do so, offered an undertaking to deliver up, during the subsistence of the mortgage, counterparts of any leases or tenancies within one month after the making thereof. G

H. B. Vaisey, K.C., and *R. Cozens Hardy Horne* for the plaintiffs.

W. P. Spens, K.C., and *A. F. Maurice Berkeley* for the defendants.

FARWELL, J.: This action has given rise to a very interesting discussion in which I have had the utmost assistance from counsel on both sides. The question I have to determine is quite a short one, and is largely a question of construction of a particular document, but it is not, in my view, a very easy one to answer. Having given the best consideration I can to the matter, and having come to a definite conclusion H

in my own mind as to the answer which I should give, I see no object in not stating what the answer is now. The defendants are the owners of the equity of redemption in certain property comprised in a legal charge dated Oct. 1, 1935. Clause 5 of the deed is in these terms so far as relevant :

(2) That the borrowers shall not except with the previous written consent of the mortgagees exercise the power of leasing or agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act, 1925, on a mortgagor while in possession. (3) That statements in writing if required by the mortgagees showing the lettings or underlettings of the property hereby charged for the time being in force shall be furnished at the expense of the borrowers every six months to Messrs. Leslie Field Prior & Co. of 25 Grosvenor Place in the county of London or other solicitors for the time being of the mortgagees.

Then the mortgagees covenant with the borrowers in clause 6 :

(1) If on each half-yearly day hereinbefore fixed for payment of interest and continuously during the period of ten years from the date hereof or within thirty days next after each such day there shall be paid to the mortgagees interest on the principal money hereby secured at the rate of £3 15s. per cent. per annum up to that half-yearly day and there shall not be any breach of any obligation statutory or otherwise binding on the borrowers or of any of the covenants whether express or implied herein contained and on the part of the borrowers to be observed or performed (other than and besides the implied covenant for payment of the principal money and interest hereby secured) then (subject as hereinafter provided) the mortgagees will not before the expiration of the said period of ten years require payment of the principal money hereby secured or any part thereof. (2) And the borrower hereby covenants with the mortgagees that (subject as hereinafter provided) the whole of the principal money hereby secured shall be allowed to remain in this security during the said period of ten years.

Then there follow other provisions which I do not think it is necessary to refer to. That charge having been duly executed and coming into force almost immediately afterwards, that is to say, on Oct. 8, 1935, the defendants granted a lease of a certain office, a portion of the mortgaged property, to two persons at a rent of £65 to hold from Sept. 29, 1935, upon a yearly tenancy. There is nothing else in the agreement for the lease to which I need refer. The fact that a lease had been granted was unknown to the plaintiffs, and their consent was never sought nor given, and it only came to their notice when, on Jan. 6, 1936, the plaintiffs' solicitors wrote and asked the defendants to provide them with a statement in writing showing the underlettings as on Jan. 1, 1936. In answer to that, the secretary to the defendant company informed the plaintiffs of this agreement for lease to which I have just referred. They then raised the question whether the granting of such a lease was not a breach of the covenant contained in the charge and whether accordingly the provision as to the ten years during which the loan was to remain outstanding was no longer binding on the plaintiffs. They commenced this action, which is not strictly a hostile action, for the purpose of having determined by the court the respective rights of the parties.

In order to determine this question, I think it is necessary to consider

quite briefly the position between mortgagors and mortgagees before either the Act of 1925 or the earlier Act of 1881. Under the law as it was before the Act of 1881 came into existence, the position was that, where there was a legal mortgage, the mortgagor, although in possession, had no power to grant a lease which could be binding on the mortgagee. A Any lease he might attempt to grant to some third party would be in no way binding on the mortgagee, and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment. So far as the mortgagor was concerned, it would be binding upon him, and against the lessee he would be estopped B from denying the existence of the lease or that he had granted it. Except against the mortgagee or against any person having a title paramount to the mortgagee, such a lease would be good and the lessee would be entitled to the benefit conferred thereby ; but as against the mortgagee the lessee would have no estate or interest under the lease except that C he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property. That position was altered by the Conveyancing Act of 1881, because by that Act express power was given to the mortgagor in possession to grant leases on certain terms and subject to certain conditions. In my judgment, the effect D of that statutory power would enable the mortgagor for the first time to do something which hitherto it had not been possible for him to do, namely, to grant a lease during the continuance of the charge which would be binding on the mortgagee. The fact that that power was given to the mortgagor does not, and did not, in my judgment, deprive the E mortgagor of the right which he had apart from the Act altogether, namely, to grant a lease to a third party without the consent of the mortgagee which would not be binding on the mortgagee, but would be binding as between the lessor and the lessee. I cannot find that the power which the mortgagor had in that regard was taken away by the F Act. What the Conveyancing Act, 1881, did was to make the position one which is perhaps more satisfactory as between the mortgagor and mortgagee by enabling the mortgagor, subject to the conditions and provisions of the Act itself, to grant a lease which was binding on the mortgagee. That, in my judgment, was the position, at any rate, up G to the coming into force of the Law of Property Act, 1925. The right in a tenant who was in under a lease granted by the mortgagor, which was not binding on the mortgagee to redeem, was in existence until 1925, and it existed by reason of the fact that the power of the mortgagor to grant such a lease was not affected by the Act of 1881. Then the H question arose : Did the Act of 1925 alter the position prior to the passing of that Act in this respect ? The section of the Act which I have to consider first is sect. 99. Sect. 99 provides :

- (1) A mortgagor of land while in possession shall, as against every incumbrancer,

have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised. (2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make from time to time any such lease as aforesaid.

Then there follow provisions with regard to the length of leases which
A can be granted and the conditions upon which they can be granted, and subsect. (8) provides as one of the conditions :

A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

B Then subsect. (11) provides :

In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.

C I have already said that the granting of the lease which I have to consider in this case was not known to the mortgagees until the letter to which I have called attention, and in fact no counterpart was delivered to the lessor prior to the execution. Then subsect. (13) is of some importance.

D This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

I do not think there is any other subsection in that section to which
E I need call special attention. The other section which it is necessary for me to consider is sect. 152. Sect. 99, as I understand it, is the section which regulates the rights as between the mortgagor and the mortgagee in connection with the granting of leases. Sect. 152 is the section which I think is intended to protect, so far as possible, persons who take leases
F of mortgaged property. The section begins :

(1) Where in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease (in this section referred to as an invalid lease) is granted, which by reason of any failure to comply with the terms of the power is invalid, then—

G (a) as against the person entitled after the determination of the interest of the grantor to the reversion ; or

(b) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease ; the lease, if it was made in good faith, and the lessee has entered thereunder, shall take effect in equity as a contract for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power :

H (2) Where a lease granted in the intended exercise of such a power is invalid by reason of the grantor not having power to grant the lease at the date thereof, but the grantor's interest in the land comprised therein continues after the time when he might, in the exercise of the power, have properly granted a lease in the like terms, the lease shall take effect as a valid lease in like manner as if it had been granted at that time.

(6) Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the interest

of the grantor or otherwise, cannot have effect and continuance according to the terms thereof independently of the power, the lease shall for the purposes of this section be deemed to have been granted in the intended exercise of the power although the power is not referred to in the lease.

There is one fact I omitted to state. The lease which was granted and to which I have referred, has in fact been surrendered, and the lessee is no longer in possession under the lease. If it was a breach of covenant to grant that lease without the consent of the plaintiffs, then there has been a breach, and the fact that there has since been a surrender cannot affect the position. Moreover, the parties, not unnaturally, are anxious to know what are the rights with regard to the future, apart altogether from the question as to whether or not this has been a breach of the covenant.

As I have said, I am unable to see that the earlier Conveyancing Act destroyed any power which the mortgagor had to grant a lease which would not be binding on the mortgagee, although it would be binding as between himself and the lessee. I am also unable to find anything in the Act of 1925 which has any such effect. Sect. 99 does not in terms state that the only power of granting leases is the statutory power, and I can see nothing to suggest that the mortgagor was intended to be deprived of this power, if he had it, of granting a lease which he undoubtedly had, although that lease was not binding on the mortgagee. One has to bear that in mind when one comes to consider the true construction to be put upon these clauses in this particular document. It is quite plain, having regard to sect. 99 (13) of the Act, that the parties can agree as to any further terms apart from the provisions and obligations imposed by the section itself. There is nothing to prevent the mortgagor and mortgagee agreeing that the statutory powers shall not be exercised, or that they shall be exercised in a wider way than that provided by the section or in a more restricted way than that which the section provides. In my judgment, when there is inserted in the mortgage a covenant by the defendants that they will not, except with the consent in writing of the mortgagee, exercise the powers given by the statute, the effect of that is to impose a further and additional term on the obligations which are contained in the Act itself, and that an exercise or purported exercise of a power for which no previous consent has been obtained is not an exercise of the statutory power at all, because as the result of the agreement made between the parties the only power of leasing given by the statute is the power of leasing with the consent of the mortgagee. If I read into the section the overriding obligation of obtaining the written consent of the plaintiffs, the effect must be that if there is no such written consent, then the power which otherwise would have been exercisable by the mortgagor has not been validly exercised. It is suggested that that is not the true way of construing this document. It is suggested that the mortgagors have

- power to grant a lease under the statute although they have not obtained the consent of the plaintiffs, and that the only effect of not obtaining that consent is that the defendants have committed a breach of one of the covenants in the mortgage with the result that the plaintiffs are no longer bound by the provision as to the ten years limit. In my judgment, that is not the true way of construing this document. It is not perhaps very relevant, but it does occur to one's mind that if the above be not the true construction, the position of the mortgagees might be a somewhat unhappy one, because notwithstanding the fact that they were not prepared to permit the mortgagors to grant leases without their consent, they would find themselves bound by a lease granted by the mortgagors although no consent had been obtained, leaving to them the only remedy open to them, namely, an action for damages on the covenant and a right to assert their rights under the deed itself ; but, on the other hand, if the true construction is that there is no power in the mortgagors to grant a lease under the statute for which they have not previously obtained the written consent of the plaintiffs, then the plaintiffs cannot find themselves bound by the terms of a lease of which they have had no previous notice at all. If that be the true view, when the defendants granted the lease in question to the lessees they were not, in my judgment, granting a lease under the statute at all : they were granting a lease to the lessees which was in no sense binding on the mortgagees ; the mortgagees, when they ascertained the existence of such a lease, had their remedy open to them of taking such steps as they thought fit against the lessees. That they would obtain knowledge of such a lease at a reasonably early date is quite plain from the terms of the mortgage itself which provides that the mortgagors shall, if required, supply particulars of the lettings, and although such a letting would not be a lease under the Act, it would undoubtedly be such a letting as to which information would have to be given to the mortgagees if they so desired. If the true view is that when the defendants granted the lease to the lessees they could not have been exercising the power to lease which they were given by the statute, then it must follow that by what they did they did not commit any breach of the covenants in the charge. They, therefore, could only be doing that which they could have done apart from the statute, namely, grant a lease which could have no binding effect on the mortgagees at all.

- It is said that in some way sect. 152 (6) prevents that position arising, but, in my judgment, that subsection does not have the effect of creating a power which was not otherwise in existence, and if the power of leasing given by the statute is not—having regard to the terms of the charge itself—one which could have been exercised in the circumstances and was not exercised in the circumstances, then sect. 152 cannot, in my judgment, avail the lessee or anyone else to make the lease one granted

under the statutory powers. The power of leasing, apart from the statute, as I have said, remains, and that must be taken to be the power which was exercised, and to that extent the lessee as against his lessor is, of course, entitled to the benefit of anything he can find in sect. 152, but the lessee would not be entitled, in my judgment, to find in sect. 152 the right to say that although the power of leasing given by sect. 99 was not exercisable at all having regard to the circumstances, nevertheless it must be duly exercised for the purpose of giving effect to the lease as against the mortgagee. The truth of the matter is that, when one comes to the conclusion that the statutory power of granting leases is by the terms of this particular charge fettered by the further provisions which the parties themselves have made, it is only to be exercised with the consent of the plaintiffs, then the power is only exercisable subject to such consent, and it follows that, when the defendants proceeded to grant the lease, it was not a lease and could not have been a lease which was granted under the statutory powers at all. The only effect of the lease was between the mortgagor and the lessee, and it was not in any sense binding upon nor could it be operative against the mortgagees who could take any steps they thought fit to put an end to the occupation of the tenants. If that be the true view, it must follow that this action cannot succeed, because so long as the mortgagors have not exercised their statutory powers without the consent of the plaintiffs, they are not committing a breach of the covenant contained in this charge; but, as the mortgagors themselves in their defence have agreed to undertake during the subsistence of the charge to deliver to the plaintiffs within one month after the making of any lease or tenancy agreement in respect of the property comprised in the legal charge or any part thereof, whether such lease or tenancy be made pursuant to the power conferred by the Act or not, a counterpart of the lease or tenancy agreement duly executed by the lessee or tenant, I think it would be right that such an undertaking should be given by the defendants and that the order I propose to make should contain that undertaking by the defendants. Subject to that undertaking, the action should be dismissed with costs.

Solicitors: *Leslie Field, Prior & Co.* (for the plaintiffs); *Mead, Sons & Bingham* (for the defendants).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

METROPOLITAN WATER BOARD v. WATKINS.

[CHANCERY DIVISION (Farwell, J.), January 14, 1937.]

*Bridge—Erected to avoid severance from highway—Covenant to maintain—
Right to carry cables and mains over bridge.*

A A strip of land running the length of the vendor's property was conveyed to purchasers for use in connection with a reservoir, with the result that the vendor's property was severed from the highway by a conduit. The purchasers accordingly covenanted in the conveyance that they would at their own expense erect and maintain across the conduit a bridge of not less than 30 ft. in width to connect the severed portion of the vendor's land with the highway. There was no means of access to the vendor's land except by means of this bridge. The vendor's successor in title, desiring to develop the land as a building estate, claimed to be entitled to use the bridge for the laying of pipes and cables for the supply of water, gas and electricity and other services :—

B
C HELD : upon the true construction of the conveyance the vendor's successor in title was not entitled to place and maintain upon the bridge anything of a permanent nature which must necessarily be maintained, and he was not entitled to lay pipes or cables on the bridge for any purpose.

[EDITORIAL NOTE. Though this is the construction of a particular covenant, the question at issue is a very general one, and the case will prove of considerable value to draftsmen of agreements in connection with building estates and agreements as to private bridges.]

D AS TO BRIDGES NECESSITATED BY PUBLIC WORKS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 405, 406, para. 569 ; and FOR CASES, see DIGEST, Vol. 26, pp. 580-582, Nos. 2705-2719.]

E ACTION for a declaration that on the true construction of a conveyance dated Dec. 11, 1899, made between Mary Ann Dearle South, of the one part, and the Staines Reservoir Joint Committee of the other part, the defendant had no right or interest in a bridge, the property of the plaintiff board, connecting the defendant's land with the highway known as the Stanwell New Road, other than a right of way on foot or with vehicles over the bridge for the purpose of passing and repassing from the Stanwell New Road to his land. The defendant claimed that he was entitled to use the bridge for all purposes, and he counterclaimed for a declaration that he was entitled to use the bridge for the purpose of connecting his land with the Stanwell New Road by means of pipes and cables for the supply of water, gas and electricity and other services. The facts and the material parts of the conveyance are set out in the judgment.

H Hon. S. O. Henn Collins, K.C., and W. F. Waite for the Metropolitan Water Board.

J. W. Manning, K.C., and G. D. Squibb for the defendant.

FARWELL, J. : In this action, the plaintiff board, the Metropolitan Water Board, is suing the defendant, Mr. Watkins, who is the owner

of land which immediately abuts upon the Staines Reservoir aqueduct which is now in the possession of the plaintiff board. The Staines Reservoir aqueduct separates the defendant's land from a high road, known as the Stanwell New Road, and that road leads directly into the London Road, which is the main road from London to Staines. The defendant claims the right to use, or to lay, construct, and keep, upon a bridge, which is the property of the plaintiff board, pipes and cables, for the purpose of carrying a supply of water, gas, electricity, and other services to his land. The question, in my judgment, really wholly turns upon the construction of a conveyance, to which I must make reference in a moment. The question, although a short one, is not necessarily easy to determine, but I have had the assistance of counsel upon both sides, whose arguments have been none the less serviceable because they were concise. Certain facts which are relevant are these. In 1897, the land which is now the property of the defendant was the property of one, Miss South, but it extended beyond the land which is now in the possession of the defendant, because it included a strip of land which ran down to what is now the Stanwell New Road, so that the land which was in the ownership of Miss South abutted immediately upon the Stanwell New Road, and had a frontage to that road. In Feb., 1897, the Staines Reservoir Joint Committee gave notice to treat to Miss South, for the purpose of acquiring a portion of the land, which would have the effect of cutting off Miss South's land from the road altogether. It was a narrow strip of land, immediately abutting upon the Stanwell New Road, which would have the effect, in maintaining the property of the plaintiff board or that of the predecessors of the plaintiff board, of separating the land of Miss South entirely from that high road. The Staines Reservoir Joint Committee was a statutory body created by an Act of Parliament, but it has now been succeeded by the plaintiff board, the Metropolitan Water Board, by the Metropolitan Water Act, 1902, and the Metropolitan Water Board has exactly the same rights, and any other rights, so far as this question is concerned, as the Staines Reservoir Joint Committee had. Now, the notice to treat having been given, there were negotiations, and, finally, there was a conveyance by Miss South to the Staines Reservoir Joint Committee of the piece of land in question, and that conveyance includes a covenant, which gives rise to the difficulty here, and which I have to construe. The conveyance is dated Dec. 11, 1899, and made between Mary Ann Dearle South, of the one part, and the Staines Reservoir Joint Committee, of the other part, and it recites that the vendor is in possession of the strip of land in question; it recites the powers of the Joint Committee and the notice to treat, and then it :

Witnesseth that in pursuance of the said agreement and in consideration of the sum of £1,000 on or before the execution of these presents paid by the Joint Com-

mittee [the vendor conveys as beneficial owner to the purchaser] all that piece or parcel of land situate in the parish of Stanwell in the county of Middlesex containing 1 acre 2 roods and 9 perches more or less (which hereditaments and premises form part of the hereditaments numbered 41) [and then it refers to the plan] together with all the mines and minerals (if any) in or under the same to hold the said premises unto and to the use of the Joint Committee its successors and assigns in fee simple freed and discharged from all right of pre-emption by the vendor her heirs executors administrators or assigns under or by virtue of the said Acts or any of them and from all such other rights and claims of the vendor her heirs executors administrators or assigns as hereinafter mentioned or referred to.

Then follows the covenant :

And the Joint Committee hereby covenants with the vendor that they will at their own expense erect and for ever thereafter maintain across the conduit intended to be constructed upon the land hereby conveyed a bridge of not less than 30 ft. in width to connect the severed portion of the vendor's land with the Stanwell New Road such bridge to be as nearly as may be half way between the northern and southern boundaries of the land hereby conveyed.

The rest of the document is not relevant to anything that I have to determine. Subsequently, in 1930, Miss South, who by that time had become Mrs. Kitchen, conveyed the property which she owned to another lady for the sum of £1,600, and on the same day that lady conveyed to the defendant the site of the same land at an enhanced price of £2,800. At some time after the conveyance of 1899, the bridge was duly erected. It was a bridge 30 ft. in width, and, as was required by the covenant, was approximately in the middle of the land of the defendant, where it abutted upon the Stanwell New Road highway, and no objection had been taken, so far as I know, to that bridge, or to the way it has been maintained by the plaintiff board's predecessors, or by the plaintiff board, and no question with regard to it has arisen down to the present, or comparatively recent times.

The question I have to decide is this. The defendant was anxious to develop the land he had acquired for building purposes. He is shut off from the high road by this piece of land which was acquired by the plaintiff board from Miss South, and there is no means of access for him beyond his land to the high road, except by means of this bridge which was erected by the plaintiff board in pursuance of that covenant which I have just read, and he is desirous, therefore, of using the bridge for the purpose of carrying over it pipes and cables to serve for a supply of water and gas and other services to the land on which he is proposing to build, or which he is proposing to develop as a building estate, and the plaintiff board objects to such user of its bridge, and it says that the defendant is not entitled to do as he seeks to do. On the other hand, the defendant claims the right to do it, and counterclaims for a declaration accordingly. As I have said, the question turns upon the construction of the conveyance. There are certain matters which I am entitled to take into consideration. In 1899, when this conveyance and covenant was made, so far as I know, the land which was then the property of Miss South was agricultural land. It would appear, from a plan which

is before me, that a portion of the land was orchard ; there seems to have been a bungalow in the middle of fruit trees or other trees, and there were further two pieces of land which were used for some agricultural purpose. As to when the neighbourhood of this property began to grow, I do not know ; I have no evidence about it at all, but it is not unreasonable, I think, to suppose that the possibility of development of this neighbourhood must have been present to the minds of the parties even so long ago as 1899. However that may be, I have no evidence before me as to what the state of the bulk of the neighbourhood was. The bridge, which has a width of 30 ft., and is built in accordance with the covenant, is, as I have said, the only means of access from the defendant's land to the high road. When the plaintiff board's predecessor acquired this strip of land for the purpose of making the aqueducts which it had, it also built other bridges in the neighbourhood across the aqueduct, but the other bridges it built were some 12 ft. in width only, whereas the one which it built under the covenant with the defendant was 30 ft. in width. Now, it is said, on the one hand, that the purpose for which this bridge was erected was to enable carts and foot-passengers to pass and repass from the high road on to what is now the defendant's land, and that no other or wider purpose can have been intended to have been granted, or to have been reserved to the defendant board's predecessors, than such a grant. However, on the other hand, it is said that this bridge was to afford connection, and the only connection, between the defendant's land and the high road, and, that being so, the right of the defendant must be such as to entitle him to use this means of communication for any purpose for which he finds it necessary, in order to join up his land with the high road, and that the user of this bridge for the purpose of cables and pipes and sewers, or anything of that sort, is such a user as was intended to be, and was, in fact, assigned by these covenants to the defendant and his predecessors in title for the use of his pipes. Now, the matter turns purely on the question of construction. The first thing to be noticed is that the land over which this bridge was to be constructed, by virtue of this covenant, became the property of the plaintiff board and its predecessors, and therefore, when the defendant's predecessor, Miss South, conveyed this land to the plaintiff board's predecessors, she was, in a sense, reserving to herself and her successors in title some rights in the land, because she was making it necessary for the purchaser to build the bridge for the purpose of connecting her land with the high road. But the bridge, when it was erected, and the whole structure of the bridge and roadway to the middle of the bridge, would be, of course, the property of the purchaser and no one else's property. The only rights which the vendor would have in such a bridge was such right as had been reserved to her by this document. Now, the covenant

is, at its own, the Joint Committee's, expense, it will erect and for ever thereafter maintain, across the conduit intended to be constructed upon the land hereby conveyed, a bridge of not less than 30 ft. in width. Therefore the first obligation is to erect, and, having erected, to maintain

A for ever, this bridge, a bridge of at least 30 ft., across the land which the plaintiff board, the purchasers, had acquired. The covenant, so far as that is concerned, was completed when a bridge of 30 ft. in width was built. It is a bridge which does connect the plaintiff board's land with the defendant's land, I suppose, and it has, so far as I know the evidence, B been maintained and properly maintained at the expense of the plaintiff board or its predecessors at all times; and up to the present time it has not been used for any purpose other than what I might call the natural purpose of getting on the plaintiff board's land, or getting off it, either on foot or by a vehicle.

C The question then is, having erected the bridge, and there being an obligation on the purchasers to maintain, did the vendor reserve to herself a right not merely to pass and repass by vehicles and foot-passage across this bridge, but to place upon it, and, it seems to me, necessarily, to maintain—that is, either below the surface of the road, or in some other

D way attached to the fabric of the bridge—such permanent structures as pipes and cables, and things of that kind? I suggested, when the case was being argued before me, that it might be helpful to construe this covenant so as to entitle the vendor or his successors in title to erect across the bridge a tramway or a light railway, although the purpose

E of such tramway or light railway would have been to connect the land with the high road, and I suggested that some much more particular words would have been necessary before the court would imply to a vendor the reservation of such a right as that, because the property which passes to the plaintiff board's predecessors in title was the land

F itself, and the bridge, when it was built, was the property of the plaintiff board or with it its predecessors in title; and any reservation out of such a property would have to be expressed, at any rate, in language which it was reasonably plain covered the right which it is sought now so to do. And the difficulty arises, of course, from the fact that the parties,

G when they entered into this deed, did not define with any particularity the purpose for which the bridge was to be used, beyond saying: connecting the high road and the severed portion of the land.

In my judgment, I cannot so construe this covenant as to entitle the vendor or her successors in title to erect and maintain upon the H bridge itself anything in the nature of a permanent structure. I suggested that, in my view, it could not be argued under this covenant that I should say the vendor would have been entitled to erect any building upon the bridge itself. To put pipes, cables, and sewers, which necessarily would remain in the bridge and be a portion of the

bridge, even though they would be put there for the purpose of connecting the high road with the land, would in my view be inconsistent with what was intended or contemplated by the parties when this deed was executed. It seems to me that, if I read this covenant as entitling the vendor or her successors in title to use the bridge for any purpose which may be necessary in order to connect their road with the high road, the burden of maintenance thrown upon the purchaser might be an extremely heavy one. In the absence of some words to indicate that the purpose of the parties, when they entered into this deed, was more than merely a connection, that is to say, a means of getting from one side of the aqueduct to the other, I cannot construe it as entitling the vendor or her successors in title to place upon the bridge anything of a permanent nature, which must necessarily be maintained. The covenant is not, in my judgment wide enough to entitle the defendant to do that which he now seeks, and to place upon the bridge the pipes and cables, and maintain them upon the bridge for the supply of water, gas, and other services. In the circumstances, I think it would be better not to make a declaration in the form in which the plaintiff board asks me to make it. I propose to make a declaration that, upon the true construction of the conveyance, and in the events that have happened, the defendant is not entitled to lay pipes or cables for any purpose on the said bridge; and I make that declaration. As in substance the plaintiff board succeeds in the action, the defendant must pay the costs.

Solicitors: *H. A. D. Collins* (for the Metropolitan Water Board); *E Candler, Sykes & Dore*, agents for *Garner & Hancock*, Hounslow (for the defendant).

[Reported by LESLIE CARNÉGIE, ESQ., Barrister-at-Law.]

FLATMAN v. POOLE. FLATMAN v. OATEY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 20, 1937.]

A *Street Traffic—Goods vehicle—Record of hours worked—Agricultural lorry—Moving agricultural implements from one farm to another—Goods Vehicles (Keeping of Records) Regulations, 1935 (S. R. & O., 1935, No. 314), reg. 6 (3) (a).*

The holder of a licence to use an authorised vehicle under the Road and Rail Traffic Act, 1933, was charged with having failed to cause to be kept a current record in respect of the period during which a driver in his employ was driving such vehicle, contrary to the Goods Vehicles (Keeping of Records) Regulations, 1935. The driver was charged with having failed to keep such a record. The regulations specially exempt the driver and owner of a vehicle used in the business of agriculture from the duty of keeping or causing to be kept such records. The vehicle in question was loaded with agricultural implements and furniture in order that they might be moved from one farm to another:—

C HELD: the vehicle was being used in the business of agriculture, and the offences charged had not been committed.

[EDITORIAL NOTE. The justices had found as a fact that this vehicle, which was on the highway carrying a mixed load of agricultural implements and furniture, was being used in the business of agriculture. The court found no cause whatever to interfere with this finding, and there is therefore in such a case no need to keep a record of hours worked under the regulations.]

D AS TO RECORDS OF HOURS, ETC., see HALSBURY Supp., Street and Aerial Traffic, para. 562 (12); and FOR CASES, see DIGEST Supp.]

E APPEALS by way of cases stated against a decision of the justices sitting at March in the Isle of Ely.

The facts proved or admitted showed that the respondent Poole, who carried on business as a farmer at Christchurch in the Isle of Ely, was the owner of a motor lorry, which was used by him for the purposes of his business; that the licence issued in respect of the said lorry was marked "goods"; that the respondent Oatey, a lorry-driver in the employment of the respondent Poole, was driving the lorry in Broad Street, March, on June 15, 1936; that the lorry was then loaded with agricultural implements and furniture, being moved from one farm to another; that, when requested by a police constable to produce his records of hours worked, journeys being made, and loads carried, the respondent Oatey failed to produce any records whatsoever, and said he was not required to keep records, as the lorry was an agricultural lorry; and that tax upon the said lorry, amounting to £24, had been paid.

H The appellant contended that, tax having been paid by the respondent Poole for the lorry at the rate aforesaid, records were required to be kept under the Road and Rail Traffic Act, 1933, and the Goods Vehicles (Keeping of Records) Regulations, 1935, even if the lorry was being used in the business of agriculture, as it was being operated under a

class "C" licence. The respondents maintained that, as the lorry was being used in the business of agriculture, it was not necessary to cause records to be kept.

The justices found each respondent not guilty of the offence charged, and dismissed the information, holding that the vehicle in question was being used in the business of agriculture. Thereupon these appeals were brought.

Hugh Boileau for the appellant.

Linton Thorp, K.C., and *Gerald Gardiner* for the respondents.

LORD HEWART, L.C.J. : In the case of *Flatman v. Poole*, the respondent was summoned because it is said that, being the holder of a licence to use an authorised vehicle, he unlawfully failed to cause to be kept a current record in respect of a period during which a driver in his employ was driving that vehicle, contrary to certain regulations for the keeping of records. The justices dismissed the information, and they have found as facts, among other things, that at all material times this respondent carried on business as a farmer, that at all material times he was the owner of a motor-lorry, which was used by him for the purposes of his said business—that is, as a farmer—that the lorry, on the particular occasion when the offence was said to have been committed :

was then loaded with agricultural implements and furniture, they being moved from one farm to another ;

and the justices, having heard the contentions of the parties, came to the conclusion that :

in so far as it was a question of fact for our decision, the vehicle in question was being used in the business of agriculture, and that therefore the respondent was not guilty of the offence.

Between these two cases there is no difference, except that, in the first case, the respondent was the holder of the licence, and, in the second case, the respondent was a lorry-driver employed by the holder of the licence. Now, the statute, I should have thought, was perfectly plain. Reg. 6 (3) (a), made under the provisions of the Road and Rail Traffic Act, 1933, s. 16, says that, in the case of a vehicle used in the business of agriculture, it shall not be necessary for the driver, or the holder of the licence, to keep, or cause to be kept, the records prescribed by these regulations. The meaning of the exception is perfectly obvious. The purpose of those records is to prevent, on the one hand, or, if that is not possible, to facilitate, the punishment of persons who employ or use motor vehicles upon the highway for such a continuous stretch of hours as to prevent the drivers from having suitable opportunity of rest, and thereby to imperil the safety of persons on the highway. To suppose

that such regulations would be applicable to vehicles used in the business of agriculture is sufficiently fantastic. But here they are expressly exempted. There was a time, apparently, when it was desired to argue that, although the normal use of a particular vehicle by a particular holder of a licence was that it should be used in the business of agriculture, nevertheless, if, upon an exceptional occasion, it could be said to be making a journey within a certain radius for the business of agriculture, the obligation to keep records would exist. It will be time enough to deal with that contention if and when it appears upon facts which give rise to it. It does not appear in this case at all. It not only does not appear on the facts as found; it also does not appear in the contentions of the appellant, as submitted. It is here found that this respondent was on this occasion using this vehicle loaded with agricultural implements and furniture in order that they might be moved from one farm to another. In my opinion, the appeals manifestly fail.

SWIFT, J. : I agree.

GODDARD, J. : I agree.

D *Appeals dismissed with costs.*

Solicitors : R. F. G. Thurlow, March (for the appellant); Metcalfe, Copeman & Pettefar (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

E

BLAUSTEIN v. MALTZ, MITCHELL & CO.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Farwell, J.), **January 26, 27, 1937.**]

F *Agency—Money recovered by agent on behalf of principal—Duty to account to principal—Jus tertii.*

The plaintiff received from his prospective father-in-law a cheque in respect of the sum required as a deposit for the purchase of a house, which cheque the plaintiff paid into his banking account. The plaintiff then drew a cheque for an equivalent amount in favour of the vendors' agents. Negotiations for the purchase of the house were broken off, and the plaintiff instructed his solicitor to recover the deposit. The solicitor recovered the deposit and entered it in his books as having been received on account of the plaintiff. Subsequently the prospective father-in-law purported to give the amount of the deposit to the solicitor and it was transferred to the solicitor's personal account. In an action to recover the amount of the deposit from the solicitor, the solicitor contended that he was entitled to set up a *jus tertii* and that the prospective father-in-law had a good title to the money :—

H

HELD : (i) the relationship of the plaintiff and his solicitor was that of principal and agent and not of bailor and bailee, and, in a money claim in which the principal was calling upon the agent, the solicitor, to account, the agent was not entitled to set up a *jus tertii*.

(ii) in any event the solicitor could not set up a *jus tertii* in this case, as, after the purported gift of the money by the prospective father-in-law, he would only be defending his own right, and not that of a third party.

[EDITORIAL NOTE. This case considers the limits of the doctrine laid down in *Biddle v. Bond* (2) as to how far an agent can set up the title of a third party. If that doctrine applies to a case of agency at all, as distinct from a case of bailment, it would seem to be restricted to the case of goods entrusted to an agent, and it is not possible for the agent to set up a *jus tertii* as against his duty to account to his principal.

AS TO *Biddle v. Bond* SO FAR AS IT APPLIES TO AGENCY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 255, 256, para. 428; and FOR CASES, see DIGEST, Vol. 1, pp. 448-456, Nos. 1372-1446.]

Cases referred to :

- (1) *Shelbury v. Scotsford* (1602), Yelv. 23; 3 Digest 101, 286.
- (2) *Biddle v. Bond* (1865), 6 B. & S. 225; 3 Digest 101, 287.
- (3) *Thorne v. Tilbury* (1858), 3 H. & N. 534; 3 Digest 102, 290.
- (4) *Roberts v. Ogilby* (1821), 9 Price, 269; 1 Digest 287, 179.
- (5) *Dixon v. Hamond* (1819), 2 B. & Ald. 310; 1 Digest 455, 1430.
- (6) *Stephens v. Badcock* (1832), 3 B. & Ad. 354; 1 Digest 674, 2351.

APPEAL from a judgment of MACKINNON, J., dated Mar. 5, 1936. The facts of the case are fully set out in the judgments.

H. J. Wallington, K.C., and *F. W. Wallace* for the appellant.

W. H. Cartwright Sharp, K.C., and *T. Lloyd Jones* for the respondents.

Wallington, K.C. : This defence of *jus tertii* cannot be successfully set up in the case of a money claim; in the case of a chattel there may be a title paramount, but not in the case of a sum of money. The plaintiff proved it was his money until the defendant received it. The defendant has failed to prove that it ever became Joshpe's. The judge had no power to determine issues between Joshpe and the plaintiff in this action.

Cartwright Sharp, K.C. : This case is analogous to *Biddle v. Bond* (2), where *jus tertii* was successfully pleaded; the only claim against Bond was a money claim; there was no question of any chattel. Blaustein was in the position of a bare trustee for Joshpe, who could at any time call on him to pay over the money, or could follow it into other hands. The defendant was in a fiduciary position. [Counsel referred to *Roberts v. Ogilby* (4), and *Dixon v. Hamond* (5).]

SLESSER, L.J. : In this case the plaintiff, Mr. Leonard Blaustein, brought an action to recover the sum of £172 10s., as "being money had and received by the defendant to the plaintiff's use." The circumstances of the case are rather unusual, and need some recitation, that the facts which appear from the evidence may be fully understood.

The plaintiff, an architect by profession, was at the end of the year 1933 engaged to be married to Miss Sybil Joshpe. The betrothed were both

members of the Jewish communion, and, in accordance with the customs of those of that persuasion, various financial conditions were attached to the engagement, only one of which is here material, that with regard to the purchase of the house to be occupied by the young couple. The plaintiff's prospective father-in-law, Mr. Israel Joshpe, said that he would furnish a sum of money, part of which was to be used for the purchase of the matrimonial home. In accordance with this arrangement the plaintiff selected a house, No. 175, Linden Lea, Hampstead Garden Suburb, in the course of erection. The price for the lease, for a term of 99 years at an annual ground rent of £16 10s., was to be £1,725. Mr. Joshpe, as a part of his gift for the purchase of this house, on Sept. 17, 1934, drew a cheque in favour of the plaintiff for £172 10s., the amount of the deposit payable on the purchase, which the plaintiff paid into his banking account. On the same date, the plaintiff drew a cheque for the same amount on the same account, payable to P. H. Edwards, Ltd., the agents of the vendors, and the plaintiff's account was duly debited with that sum. In this matter of the purchase of the house, the plaintiff employed as solicitors Messrs. Maltz, Mitchell & Co. The cheque was duly paid to P. H. Edwards, Ltd., and Messrs. Maltz, Mitchell & Co. busied themselves about the matter of the conveyance of the house. So far, all went well ; but the parties who had become engaged apparently fell out with one another. It appears from the evidence, though I do not think that it is material in this case to come to any conclusion upon the matter, that it was the plaintiff who decided that he would not go on with the match. Something has been said about that ; but it seems to me entirely immaterial. The plaintiff says that, until the breaking-off of the engagement, there had been no quarrel between the plaintiff and his father-in-law elect ; but thereafter, as sometimes happens on such occasions, relations became rather strained. On Oct. 2, 1934, Mr. Leonard Blaustein, the plaintiff, wrote to Mr. Maltz, of the firm of Maltz, Mitchell & Co., to this effect :

As I do not wish to go on with the purchase of the above property, kindly take the necessary steps to get the deposit back.

Maltz in due course communicated with the vendors, and finally the £172 10s., which had been paid over, was paid back by the vendors to Mr. Maltz, as the solicitor for the plaintiff, for him to account to his principal, the plaintiff. On Oct. 25, 1934, the defendant wrote to the plaintiff :

I have this morning received a cheque for £172 10s., being the amount of the deposit paid in connection with plot No. 175, Linden Lea. Mr. Joshpe has asked me to account for this money to him and not to you, and I understand that you indicated to him that you would give me instructions to account to him accordingly. I should be pleased if you will drop me a line confirming that I am to account to him in respect of the moneys received.

It is to be noted that that letter, putting it at its highest, is no more than

an intimation to the plaintiff that the father-in-law has asked that the money received should be accounted for to him. Mr. Blaustein, the plaintiff, objected to any such dealing with the money, which he conceived to be his. He did suggest at one time, on Nov. 5, 1934, that the cheque should be forwarded to Dr. Feldman, who is a rabbi, the chairman of some domestic tribunal, who might have compromised or settled the matter between the parties. That came to nothing. On Nov. 6, the defendant wrote to the plaintiff :

I am in receipt of your letter of yesterday requesting me to forward the £172 10s. to Dr. Feldman, who is to deal with the matter. I wrote Mr. Joshpe on Monday of last week, but have not yet had a reply from him, and, accordingly, unless he consents to the action you propose, I cannot part with the cheque in the way you suggest. Perhaps you would ask Mr. Joshpe to write me in similar terms to your letter, when I shall be happy to deal with the cheque as you indicate.

The matter went on. Finally, on Jan. 30, 1935, Messrs. Rutter & Co., who by that time were acting for the plaintiff, said that they had no intention of releasing the sum of £172 10s. :

which you hold, and we understand that Mr. Joshpe has no right to this money.

In the result, on Nov. 12, 1935, a writ was issued claiming the money. The evidence which was given before the learned judge established certain matters which do not appear from the correspondence. First, according to the uncontradicted evidence of the defendant himself, the money which he had received from the vendors he transferred on Mar. 15 from the plaintiff's account to his own office account, and a private account. It appears that, up till Mar. 15, 1935, from the time when the vendors paid over the £172 10s., it had remained accounted for, quite properly, in the books of Mr. Maltz, as the property of the plaintiff. On that date, he transferred it to his own account. He said :

I did that on the authority of Mr. Joshpe to use the money as my own.

That is on the transfer that was made on Mar. 15. According to Mr. Joshpe's evidence, he had decided to give the money to Maltz in Feb., 1935. The defendant agrees with that, in his evidence in cross-examination. Some comment has been made upon the fact that there is a total absence of reference to this matter in the pleadings, that at the time of the alleged accounting, in March, Mr. Joshpe said that he had spoken to the defendant, and the defendant had agreed that he should keep this money, and that all this was done, not in Mar., but in Feb., 1935, that is a considerable time before the issue of the writ in this action. We have to consider what possible answer the defendant can have in this case to a claim of the simplest kind brought by the plaintiff. The plaintiff says : "I gave you, as my solicitor, and as my agent in the purchase of this house, £172 10s., as a deposit. You, as my agent, received those moneys, and you are, according to recognised principles of law, now bound to account to me for the moneys which you hold as

my agent for my use, and are estopped, admitting that you received them in that capacity as my agent, from saying anything to the contrary." The defence which was argued before MACKINNON, J., and which found favour with the learned judge, as I understand his judgment, A was of a rather unusual kind. Advantage was taken of a line of authority which begins, or at any rate was recognised, as early as the reign of Queen Elizabeth in *Shelbury v. Scotsford* (1), and finds a very clear expression in the case of *Biddle v. Bond* (2), where the headnote says that the estoppel against a bailee from disputing the title of his bailor B and setting up a *jus tertii* may cease when it is shown, first, that the person claiming the *jus tertii* has a title paramount to the goods, and, secondly, when the bailee disputes the authority of the bailor with the authority of a third person. As was said in *Thorne v. Tilbury* (3), the matter must be with the title and authority of the third party. That C case is referred to in the case of *Biddle v. Bond* (2), to which I have referred.

In the present case, I think that there are two fatal objections to raising the principle which is relied upon in *Biddle v. Bond* (2). First of all, I am clearly of opinion that the case of *Biddle v. Bond* (2), following D the case of *Shelbury v. Scotsford* (1), and other authorities mentioned in *Biddle v. Bond* (2) and the cases following it, are all cases dealing with the right to property, bailment, and the like. *Biddle v. Bond* (2) is itself a case against a bailee. It is dealing with the alleged wrongful dealing with chattels, and I cannot find in any of the books the slightest E reason to suppose that *Biddle v. Bond* (2) should be extended to the claiming of a sum of money due on an account, as is the case here. What Mr. Cartwright Sharp said to us, and it is an argument which apparently found favour with the learned judge in the court below, was this. He said *Biddle v. Bond* (2) is capable of a much greater extension. When F you look at the declaration in that case, you find that it was a claim in debt, and, therefore, was dealing with money, and, for that reason, the question of bailment arose only indirectly. He said that the title of a third party to an account can similarly be sustained under that authority. With every respect to Mr. Cartwright Sharp's argument, G and with every respect to the learned judge, I have formed an entirely different conclusion. It is true that, in *Biddle v. Bond* (2), the declaration having set out that the defendant had promised to sell and dispose of the goods of the plaintiff, and on request to render to the plaintiff a true account of the sale, and of the moneys arising from such sale, and H to pay over such moneys to the plaintiff, to that extent the action was rightly framed in debt; but the debt arose from the wrongful dealing with the goods. In order to see whether the principle of *jus tertii* arises, there must be a wrongful dealing with the goods; or it may be that, in a particular action, debt, and not trover, is the proper method of

testing the question, not of the title to the goods but the title to moneys arising from the sale of the goods. The whole principle is based upon bailment, and upon title paramount to bailment. As a matter of fact, though the cases do not appear to have been cited to the learned judge in the court below, there is authority to the effect that, where an agent would otherwise be bound to account to his principal in respect of moneys paid to him, he cannot resist the claim of his principal by alleging some claim made to it by some other person. I am speaking now not of chattels, but of moneys received on the principal's behalf, which must be paid over or accounted for to him. There are two authorities which I wish to mention. The first is the case of *Roberts v. Ogilby* (4). In that case :

the plaintiff brought this action of assumpsit against his insurance brokers, to recover from them the amount of a total loss received by them from the underwriters. The declaration was for money had and received, and consisted merely of the common counts. The defendants pleaded the general issue, and a set-off.

It appears from the evidence that the defendants effected an insurance of a certain ship, and that the insurance was to be sent to the plaintiff. There was a loss, and moneys became due. The defendants received the sum insured from the underwriters. The plaintiffs then asked whether they might recover their money. The defence was set up that there were interests in third parties against the claim and title of the principal. That is stated on p. 277. On pp. 281 and 282, in the judgment of RICHARDS, C.B., it says :

It is clear, that Roberts the plaintiff, through the medium of Evans, contracted with the defendants : and they knew that Evans acted for Roberts, and Roberts was the only party contracting with them. It appears from the letter of the defendants, dated May 1, that they knew (how they knew it does not appear) that Roberts, by the letter containing the order of the captain, authorised them to insure the ship for himself only ; and they disclaim all agency for any other person. They, following his directions, insured the ship as his agent, and they received the money from the underwriters as his agent. It is true, the plaintiff writes a letter, wherein he says, that he ordered the insurance on the share of other persons, the Welch owners ; but that was clearly the first intimation the defendants had, that there were any other persons connected with Roberts in the adventure, and that he was not owner of the whole. That they themselves expressly state, in the postscript to their letter, in answer to that of the plaintiff. They would undoubtedly, as they state, have been entitled to recover the premiums from Roberts, and from him only ; and that would be sufficient to give him a right to recover on his own sole account in this action against them, on the ground of mutuality of liability. It was urged, that all the owners might still bring an action against the defendants, notwithstanding this verdict. I think they cannot ; for there is no privity between other persons and these defendants. There is nothing, out of which the other owners could make a case against them, whatever they might do against Roberts. It now appears, indeed, that the plaintiff considered the defendants agents of others as well as himself ; but that was not known to the defendants at the time when they effected the insurance, and they have since in fact disclaimed such agency in terms. The plaintiff alone employed the defendants ; and they, as his agents, having since received the money from the underwriters, must be held to have received it for his use, and are therefore liable to him for the amount.

The other learned judges speak to the same effect. It will be noticed that, in that case, no suggestion of any such principle as is to be found

in the case of *Biddle v. Bond* (2) or the earlier cases is to be found. The other case to the same effect, which I do not propose to discuss in detail, is the case of *Dixon v. Hamond* (5). The headnote says :

A An agent cannot dispute the title of his principal ; and therefore where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight and charged them with the premiums, etc. ; and, on a loss happening, received the money from the underwriters :—
HELD : that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged.

B ABBOTT, C.J., says, on p. 313 :

Here the defendant has received the money as agent for the partnership, and he cannot now be permitted to say, that he received it for the benefit of Flowerden alone. All the rest of the world, except the defendant, might dispute the legal title of the plaintiffs to the ship, but he cannot do it.

C With regard to the other matter, namely, that, at the time of action brought, such proportion as the father-in-law, Mr. Joshpe, might claim of this £172 10s., had already been transferred to the defendant, I have mentioned the case of *Thorne v. Tilbury* (3), which is referred to in *Biddle v. Bond* (2) on p. 234, and is to the effect that :

D a bailee can set up the title of another only "if he defends upon the right and title, and by the authority of" that person.

For the reasons which I have stated, it is quite impossible to apply here the principle of *Biddle v. Bond* (2). If it could be applied, I cannot understand how it could be said that Mr. Joshpe could give right title
E and authority to the defendant Maltz to set up as his agent, when Mr. Joshpe stated before action brought that he had given the money to Maltz himself. Obviously, the only possible title which could interest him at the time of action brought was the title of Maltz. In my opinion, for the reasons which I have stated, Maltz has no title whatever to this
F £172 10s. I think that, when properly considered, this is simply a case of principal and agent.

I have given judgment at some length, because I have had the misfortune to differ from the judgment of MACKINNON, J., For the reasons which I have stated, I think that this appeal should be allowed.

G
SCOTT, L.J. : I agree. There are two questions in the case. The first is whether *Biddle v. Bond* (2) applies, and the second is, if it does not apply, what is the position which results ? In my view, *Biddle v. Bond* (2) has no application whatever to the facts in this case. Those
H facts, as I understand them, are quite simply these. Mr. Joshpe made a present of £172 10s. to the plaintiff in the action, in these circumstances. It was intended that the plaintiff should become the son-in-law of Mr. Joshpe, and, upon the marriage taking place, Mr. Joshpe's intention was to make a present of some £4,000 to the young couple,

to include the cost of buying a house. The plaintiff received from Mr. Joshpe a cheque for £172 10s., which was equal to a 10 per cent. deposit on the house which the young couple selected as suitable for their purposes, and on the same day drew his own cheque in favour of the house-agent acting for the vendor of the house. The negotiations A for the house were never carried through; the negotiations for the marriage itself fell through. When that happened, the plaintiff instructed the defendant, who was his solicitor, to recover the deposit from the vendor's agent. This the solicitor did. Having obtained the money, he entered it in his books as having been received on account of the B plaintiff. Some months later, in Feb., 1935, he transferred that item from the place in which it was, namely, the plaintiff's account, to his own personal account. The plaintiff asked the defendant solicitor to return to him the money. The defendant solicitor refused to do so, his excuse being that Mr. Joshpe had made a claim upon him for that C sum.

To those facts *Biddle v. Bond* (2) has, in my view, no application whatever. The defence which is set up is that, under the principle of *Biddle v. Bond* (2), the defendant solicitor became entitled as of right to refuse to hand over to his own client the money which he had collected for D his client and held in his own banking account. *Biddle v. Bond* (2) is a case which depends entirely upon the law of bailment. I am inclined to think that it is a particular application of the general rule that possession of goods gives the possessor a good title against all the world except the true owner. *Biddle v. Bond* (2) decided one point only. That E point was that, where there is a bailment, and the plaintiff sues the bailee to recover the goods, or, if they have been turned into money, their proceeds, the bailee may, if the facts warrant it, say: "I am refusing to give these goods or the proceeds of them to you because they are not yours; they belong to a third person, and, on his authority, and F on his instructions, I am holding them for him." In this particular case, as my Lord has said, even assuming (which is an erroneous legal presumption) that *Biddle v. Bond* (2) has any relevance at all, that answer would not be available to the defendant. He is not in a position to say that he is defending *in jure tertii*, because, after he transferred the G item to his own account, in accordance with what he said Mr. Joshpe told him he might do, he would be defending in his own right. Further than that, there is no instruction by Mr. Joshpe to him such as would constitute an authority from the true owner within the meaning of *Biddle v. Bond* (2). The right view of the facts, putting aside *Biddle v. Bond* (2) as inapplicable, is, I think, that the relations of the parties were merely those of debtor and creditor, and that questions of accounting only are those which we have to consider. I assume that, when the marriage fell through, the plaintiff became indebted to Mr. Joshpe on H

the ground that the £172 10s. had been a gift on condition, namely, that the marriage went through. When the condition failed, a debt arose, and Mr. Joshpe would have been entitled to sue, and to-day is entitled to sue, the plaintiff for this £172 10s., the money which he had received.

- A The plaintiff did not hand over Mr. Joshpe's cheque; he drew a cheque himself on his own banking account, and sent it direct to the estate-agents, or the vendor, of the house which he was proposing to buy. When the marriage fell through, he instructed the defendant, his own solicitor, to get back the deposit on his behalf. The defendant was
- B under an obligation to get it back, and he did get it back. Having received the money, he was under an obligation to his client, an ordinary obligation as agent and solicitor, to hand over the money to his client. In such circumstances, no question of *jus tertii* can arise. The only relationship between the plaintiff and the defendant is that of client and
- C solicitor, creditor and debtor. It may be that the solicitor was, in addition, under a fiduciary duty to account to the plaintiff for the money; I think he was; but in no case can a direction or authority from Mr. Joshpe entitle the defendant to refuse to pay over the money. The law is perfectly clear that an agent receiving money rightfully for his
- D principal is not liable in respect of that money to the owner of the money even where the principal, upon receiving it, would be bound to pay it over to the owner. *Stephens v. Badcock* (6) is an authority for that proposition. It would be no defence to an action for account by a client against a solicitor for the solicitor to say: "As against you, the third
- E party says that he has a good claim in debt for an identical sum and he has asked me to pay to him direct, so as to save him the trouble of suing you." That is what the respondent here is submitting that we ought to say is the law. In my view, it is not the law. Here there is no defence to the claim in debt by the client against the solicitor to hand
- F over money which he has collected for the client, which he is bound to hand over upon demand.

- FARWELL, J.: I agree. As we are differing from the learned judge below, I desire to say a very few words on the matter. The action is
- G an action for money had and received, the defendant having received the money as agent and solicitor for the plaintiff. The defence sets up that the defendant was entitled to set up a *jus tertii*, and that a third person, Mr. Joshpe, had a good title to the money, and that, therefore, that afforded to the defendant a good defence to the action. MACKINNON, J.,
- H accepted that view, and decided against the plaintiff, on the authority of the case of *Biddle v. Bond* (2). As I understand the judgment of the learned judge below, that was the only ground upon which his judgment was founded.

With regard to *Biddle v. Bond* (2), I think it is necessary to see what the

facts in that case were in order to appreciate the judgment. The goods in question were goods of one Robbins. They had been seized by the plaintiff, and by him delivered to the defendant, Bond, with orders from the plaintiff to sell those goods, and to retain the proceeds for the plaintiff. Before the sale took place, while the chattels were still in A the hands of the defendant, the true owner, Robbins, gave notice to the defendant that the goods were his, that he therefore had a good title to them, and that the defendant must retain the goods for him, the third party. That notice was given at the last moment, on the eve of the sale. The sale proceeded, and, instead of the goods, the defendant B had in his hands the money representing the goods. The whole case proceeded upon the footing that the mere fact that the chattels had been turned into money did not affect the right of the defendant to say, as a defence to this action, that he was a bailee of the goods, and as such was entitled to set up the title of the true owner. In my judgment, C that case is no authority for the proposition that, in a money claim in which the principal is calling upon his agent to account, the agent is entitled to set up a *jus tertii*. *Biddle v. Bond* (2) is a case of bailment, and nothing more, and, in my judgment, it is no authority to support the defendant in a case of this kind. D

I desire to say no more, except this, that I must not be taken as assenting to the view which SCOTT, L.J., has expressed as to the rights between the plaintiff in this action and Mr. Joshpe. What those rights may be I desire to leave undecided so far as I am concerned, and the matter can be decided if and when the question arises between them. E

Appeal allowed with costs.

Solicitors: *S. Rutter & Co.* (for the appellant); *Maltz, Mitchell & Co.* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*] F

**Re AN APPLICATION BY T. RYAN SOMERVILLE &
CO., LTD.**

[RAILWAY AND CANAL COMMISSION (MacKinnon, J., Sir Francis Taylor, K.C., Sir Francis Dunnell), **January 21, 1937.**]

Mines—Application for ancillary rights for working a quarry—Jurisdiction of Railway and Canal Commission Court—Declaration—Repair of highway—Mines (Working Facilities and Support) Acts, 1923 and 1925.

The applicant company was extending the works in connection with a limestone quarry and had agreed with neighbouring owners to construct a road leading to a public road. The latter road had recently been greatly improved by another quarry company at its own expense, and the liability of repairs to the road had never been settled. Upon this further addition to the traffic on the road being suggested, the county council asked the applicant company to come to some arrangement with it as to the repair of the road. Upon an application for the grant of certain ancillary rights, the applicant company also asked for a declaration that the public road in question was a carriage road repairable by the inhabitants at large, and, in the events which had happened, by the Derbyshire County Council :—

HELD : the Railway and Canal Commission Court had no jurisdiction to make the declaration asked.

[EDITORIAL NOTE. The jurisdiction of the Railway and Canal Commission Court is again considered, and the point raised is one touching highways. It will be remembered that the jurisdiction of this court was considered in *Hoddesdon U.D.C. v. Broxbourne Sand and Ballast Pits, Ltd.*, [1936] 1 All E.R. 798 ; Digest Supp., where the question was whether it could sanction the diversion of a highway. In the present case it is asked to make a declaration as to the liability to repair a highway, and in each case it has decided that these matters are not within its jurisdiction.

AS TO JURISDICTION OF THE RAILWAY AND CANAL COMMISSION COURT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 692-694, paras. 1473-1479 ; AND FOR CASES, see DIGEST, Vol. 38, pp. 358-360, Nos. 615-630.]

Cases referred to :

- (1) *Farquhar v. Newbury Rural Council*, [1909] 1 Ch. 12 ; 26 Digest 289, 224.
- (2) *Newton Abbot Rural District Council v. Wills* (1913), 77 J.P. 333 ; 26 Digest 392, 1186.
- (3) *A.-G. v. Mallock* (1931), 146 L.T. 344 ; Digest Supp.

APPLICATION for ancillary rights to facilitate the working of a quarry, namely, the constructing of a new road to join a public highway.

The applicant company, T. Ryan Somerville & Co., Ltd., was, by a lease dated Feb. 11, 1928, entitled to work limestone and to convert the same into lime, cement and other by-products, on a defined area belonging to the Chatsworth Estates, Ltd. The applicant company's leasehold property adjoined the London, Midland and Scottish Railway from Buxton to Ashbourne and the company's existing quarrying and other operations were developed for rail and road transport, with sidings to that railway, which were then fully employed. The applicant company

was desirous of constructing upon its leasehold lands two further modern lime-kilns, each having a productive capacity of 400 tons of lime per week, for the disposal of which the company's existing access to a public road could not conveniently be adapted, and the company therefore required a further and separate means of access for road transport, A namely, a right of access to, and user of, a public highway, running from Harpur Hill to Earl Sterndale along the western boundary of the company's leasehold property. For this purpose it was the company's intention to make (as, under its lease, it was entitled to do) a new road on its leasehold property, but, in order to meet the public B highway, it would have to be prolonged through part (referred to in the judgment as "Field 960") of the leasehold property of a company known as Hillhead Quarries Co., Ltd., the land being owned by Chatsworth Estates, Ltd.

Hillhead Quarries Co., Ltd., was willing that the grant should be C made, but Chatsworth Estates, Ltd., insisted that the applicant company should come to terms with the Derbyshire County Council for the widening and improving of the public road. The Derbyshire County Council contended that a part of the public road was repairable by the council as a bridle-path only, and therefore the applicant company could not D use it as a carriageway, unless it came to an arrangement with Hillhead Quarries Co., Ltd., or accepted responsibility for maintaining it as a carriage road. The applicant company, therefore, added to its application for ancillary rights, an application for a declaration that the road from Harpur Hill to Earl Sterndale aforementioned was a public carriage- E way. The question of the right to grant this declaration was argued as a preliminary point.

H. V. Rabagliati and *C. N. Shawcross*, for the applicant company.

P. Gordon Bamber, for the Derbyshire County Council.

A. Tylor, for Chatsworth Estates, Ltd.

A. Capewell and *J. R. Willis*, for the Hillhead Quarries Co., Ltd.

Bamber: There is nothing in the Mines (Working Facilities and Support) Act, 1923, to give the court jurisdiction in any of the matters sought, as they are in no way rights to work nor ancillary rights. Such G rights should be sought in the Chancery Division, and do not come within the special scope for which this court has been constituted: See *Farquhar v. Newbury Rural Council* (1), *Newton Abbot Rural District Council v. Wills* (2) and *A.-G. v. Mallock* (3).

Rabagliati: The Mines (Working Facilities and Support) Act, 1923, H s. 6, gives the necessary jurisdiction, and sect. 18 of the Act of 1888 in terms says that the commissioners shall have full jurisdiction to hear and determine all matters, whether of law or of fact, and have all such rights, powers and privileges as are vested in a superior court.

- MACKINNON, J.: We think it desirable to give a decision upon what may be a preliminary point in this case. This case concerns a region in Derbyshire, the freehold of which is vested in a company called the Chatsworth Estates, Ltd. In comparatively modern times, a new
- A industry has grown up of the working of limestone in this land, and there are burning kilns to make the lime. The applicant company has kilns or a factory of that type called the Hindlow Lime Works, which is situate in the neighbourhood of Hindlow station. To the north-west of them is another company, called the Hillhead Quarries Co., Ltd., which
- B has similar apparatus. The access to the premises of the Hindlow Co. was down a track, which, I gather from what I have heard, is an undoubted ancient track—I use a neutral term—giving access from Hindlow to Harpur Hill-Brierlow Bar road, running roughly parallel to the route of the old but now abandoned High Peak railway, eventually leading to
- C Earl Sterndale. That was the position of that ancient track when the Hillhead Co. developed its works. Because it wanted to cover up part of that ancient track, in 1929 it got an order from quarter sessions to divert it, and, by arrangement with the county council, or with the then local authority, it spent a considerable sum of money in building a new
- D road, and, I think, a considerable sum of money in strengthening and improving the old road before the point at which its diversion took place, that is to say, to the north of its works. The result of these operations of the Hillhead Co. was that, in fact, there came into existence a tolerably good highway or road with a decent surface, from the Harpur
- E Hill-Brierlow Bar road in the north, down to a point which, on the plan, is marked X, just to the west of a field called 960. Further on, the new diverted portion of the old track was left unmetalled, and, as it went further south, it joined the old track which went on to Earl Sterndale, which remains in its primitive, wholly undeveloped condition.
- F For the purposes of its business, the applicant company wants to get access both to the railway and to the road to carry away the lime it produces. Its existing means of getting to the road and to the railway is by means of a siding to the railway, behind its works, and by a private road it has, leading on to the high road between Longnor and Buxton,
- G but, by reason of the configuration of the ground, it has occurred to the applicant company that it would be very convenient to it to put in new kilns or a battery, or whatever it calls them, in field 974, one of the fields leased to the company. Now, it is impracticable, from the point where the company wants to erect these new kilns in field 974, to get
- H down the hill to the company's existing access to the roadway, but the new site of the kilns is, in actual distance, a comparatively short way from the point X on this metalled road, which has come into existence through the activities of the Hindlow Co. in the way I have described. The applicant company, therefore, together with Chatsworth Estates,

Ltd., and the Hillhead Co., began to see whether it could not be granted power to make a road from its new kilns through its own leasehold field 974, and through field 960. Field 960 is leased by Chatsworth Estates, Ltd., to the Hillhead Co. as part of an agricultural lease of Hillhead Farm. Up to a certain point, those negotiations were not successful. A Therefore, the applicant company applied to this court, asking us to grant it an ancillary right. I am not sure that it does not possess the right under its present lease from Chatsworth Estates, Ltd., to make a road from the point A to the point B.

It really wants us to grant it the ancillary right of making a roadway from the point B to cross field 960 to the point X. It can do that only with the consent of Chatsworth Estates, Ltd., the freeholders of field 960, and with the consent of the Hillhead Quarries Co., Ltd., who are the tenants of field 960. B

If that were the only thing the applicant company was asking for, this would be a comparatively simple case, but, incidentally, a totally different question has arisen, as a matter of business which concerns the applicant company, and it is this. A question has arisen between it and the Derbyshire County Council, as the authority concerned with the repair of public roads repairable at the public charge, as to whether the Derbyshire County Council is liable to pay for the upkeep and repair of this ancient track, as diverted in 1929, in the way I have indicated. C As I have pointed out, part of the expense of making that road was borne by the Hillhead Co., and there has been, and there is, a dispute as to whether, in the future, the county council will be bound to keep up that road. It is obviously a question of some importance to both sides, and the Derbyshire County Council is interested in this present claim by the applicant company, in that, if the applicant company does make these new kilns, and take lorries from its works along the road B to X, on to this road, there is likely to be a great deal more wear and tear on it in the future. D E F

Because of the existence of that incidental question between the applicant company and the Hillhead Co., on the one side, and the Derbyshire County Council on the other, the applicant company, in its application, applies for the grant of the following rights: (i) the right to occupy the bit of roadway between B and X in field 960; (ii) the right on the strip of land to construct a road; (iii) the right at X to make an opening from the new road to the old highway; and (iv) necessary rights of wayleave over the strip of roadway when constructed. Then it adds to that a fifth application for a grant of a further right: G H

The applicant company further asks for a declaration that the public highway running from Harpur Hill to Earl Sterndale within the rural district of Chapel le Frith in the county of Derby shown upon the plan is a public cart road and/or carriage-way, repairable by the inhabitants at large, and, in the events that have

happened, by the Derbyshire County Council, as the highway authority for the said rural district.

- The Derbyshire County Council, being served with this application, objected that, among other things, the rights asked for were not a right to
- A work nor an ancillary right within the meaning of the Act of 1923, and that this court had no jurisdiction to grant the declaration asked for by the applicant company, namely, the declaration that this was a highway repairable by the county council. I think that objection is a good one. Quite apart from the point made by the county council, as respondents,
- B I should have thought it our duty to take the objection ourselves. But, in my view, this part of the application in this case, that asks for a declaration that a certain road is a highway, is merely a claim at common law for certain relief by reason of certain public rights, and it has nothing to do with the very special powers that are granted to this court. There
- C is a doubt, and a dispute, as to who is liable to pay the necessary expense of repairing this road, and courts are available for the decision of that question. I am quite satisfied that this court is not available for the decision of that question, and I do not think we have any jurisdiction to entertain it.
- D That being so, the position is this, that the real fight which Mr. Rabagliati came here to wage was one between himself and Mr. Bamber as representing the county council, because he has come to terms with the other two opponents, Chatsworth Estates, Ltd., and the Hillhead Quarries Co., Ltd. They are prepared to agree terms with him under
- E which Hillhead Quarries Co., Ltd., shall give up its tenancy of field 960 and hand it over to the applicant company so that the applicant company shall have use of this road; they are prepared to agree certain other terms, some of which might depend upon our determination of this question as between the applicant company and the Derbyshire County
- F Council. That question, as I have said, we are not prepared to entertain, still less to decide.

- In those circumstances, it seems to me that the most satisfactory course, certainly for ourselves, and probably for the parties, would be to adjourn this application, in order that the remaining parties, the
- G applicant company, Chatsworth Estates, Ltd., and the Hillhead Co., may, in the light of our having refused to decide this question against the county council, complete the negotiations that they have carried on up to a point. From what I have heard, I have very little doubt that they will be able to agree an order, as indicated by Mr. Tylor, providing
- H for the payment by, or other obligations of, the applicant company in the alternatives that will arise, according as it is determined by the appropriate tribunal (if any and if ever) whether the county council is bound to repair this road or whether those who use it, who will be the Hillhead Co. and the applicant company, are themselves not bound

to do, but under the necessity of doing, the repairs, if they wish to use the road with safety and to their satisfaction. I think it is highly likely that they will be able to agree those terms as the terms of an order, otherwise, if we have to discuss all the matter and settle the terms for ourselves, it will take a great deal of time, and I think it will probably A
be time thrown away.

SIR FRANCIS TAYLOR: I agree: It is obvious that it is futile now to discuss any terms of an order that is going to be made by consent, the full terms of which we have not before us. B

I agree with what my Lord has said about jurisdiction, and I would like to add just this. In my opinion, the extent of the jurisdiction is to be measured by the language in sects. 1 to 5 of the Mines (Working Facilities and Support) Act, 1923, which is strictly confined to the rights of working coal, and the rights ancillary to any grants so made by this C
court. If it had been established that the road in question was a private road, we should have had jurisdiction to make an order in respect of it; but I cannot spell out from the language used in sects. 1 to 5 of the Act anything which confers upon this court the jurisdiction to make such a declaration as is asked for, a declaration which, I suppose, would be D
made by quarter sessions or by the Chancery Court, or, perhaps, by the King's Bench Division. I do not think the language of those five sections can be interpreted so as to confer upon this court that jurisdiction.

Mr. Rabagliati said that the language of sect. 6 would give us that jurisdiction. In my opinion, you cannot extract from the language used E
in respect of condition and consideration anything that would confer upon this court the right to make the declaration asked for. Mr. Rabagliati also referred to sect. 18 of the Act of 1888, which does, in terms, say that the commissioners shall have full jurisdiction to hear and determine all matters, whether of law or of fact, and have all such F
rights, powers, and privileges as are vested in a superior court. That is quite true, but I think that language, in its full extent, is limited to, and measured by, the extent of the jurisdiction which is already conferred by the Act of 1923.

SIR FRANCIS DUNNELL: I agree, and there are no observations I G
desire to make.

Application adjourned, liberty to apply to restore it, if necessary.

Solicitors: Gregory, Rowcliffe & Co., agents for Lawson, Coppock & Hart, Manchester (for the applicant company); Kingsford, Dorman & H
Co., agents for the Clerk to the Derbyshire County Council (for the Derbyshire County Council); Currey & Co. (for Chatsworth Estates, Ltd.); Beardall, Fenton & Co. (for Hillhead Quarries Co., Ltd.)

[Reported by J. MACGILLIVRAY ASHER, ESQ., Barrister-at-Law.]

PINCOTT v. MOORSTONS, LTD.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Eve, J.) **November 6, 10, 16, December 17, 1936.**]

A *Landlord and Tenant—Agreement to purchase leaseholds—Assignor to use best endeavours to obtain landlord's consent—Alternatively option to take a declaration of trust or direct method of dealing with property—Landlord's consent refused—Refusal to exercise option—Breach of contract—Return of deposit.*

B The plaintiff made an agreement to purchase the lease of certain premises and paid a deposit. It was a term of the agreement that the vendors should use their best endeavours to obtain the landlord's consent to the assignment of the lease and, if they failed to obtain such consent, that they would, at the option of the purchaser, procure a declaration of trust in her favour or otherwise deal with the same as she should direct. They failed to obtain the consent of the landlord. The plaintiff did not ask for the declaration of trust, but commenced an action for the return of her deposit. At the trial it was held that the purchaser had failed to fulfil her part of the contract and was not entitled to the return of her deposit. Upon appeal it was contended for the plaintiff that the exercise of the option to take a declaration of trust would have caused a forfeiture of the lease, and her failure to exercise such option did not therefore amount to a breach of contract. :—

C **D** **Held:** the inability to obtain the landlord's consent was specially provided for in the contract, and those provisions were binding on both parties. There had therefore been a breach of contract by the plaintiff and the deposit must be forfeited.

[EDITORIAL NOTE. The contract of sale in this instance contained rather an unusual provision to take effect in the event of the reversioner refusing his licence to assign. This provision provided for the proposed assignee taking a declaration of trust. It would seem that any such arrangement would in most cases have led to a forfeiture of the lease and was, in fact, an unworkable alternative. The decision of the proposed assignee not to exercise the right to take such a declaration is, however, held to be a breach of contract.

E **F** **FOR ASSIGNMENT WITHOUT LICENCE,** see HALSBURY, Hailsham Edn., Vol. 20, pp. 347-349, paras. 418, 419; and **FOR CASES,** see DIGEST, Vol. 31, pp. 388, 389, Nos. 5336-5342.]

Cases referred to :

- G** (1) *Peebles v. Crosthwaite* (1897), 13 T.L.R. 198; 31 Digest 376, 5226.
 (2) *Jackson v. Simons*, [1923] 1 Ch. 373; 31 Digest 378, 5241.
 (3) *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465; 36 Digest 192, 332.
 (4) *Chaplin v. Smith*, [1926] 1 K.B. 198; 31 Digest 376, 5228.

APPEAL from a decision of BRANSON, J., dated Mar. 10, 1936.

T. F. Davis for the appellant.

H *St. John Field, K.C.*, for the respondent company.

GREER, L.J. : On May 17, 1932, by a lease of that date, a company called Antifyre, Ltd., leased to Samuel Cecil Traver Moorhouse certain rooms at 14, Orange Street, Leicester Square, London, for a term of

21 years less 3 days, from Dec. 25, 1926, at a rent of £550 per annum. The lessors were themselves lessees of the said premises. The lease to Mr. Moorhouse contained a covenant by him not to assign, transfer, underlet, or part with possession of the demised premises, or any part thereof, without the previous licence in writing of the landlords and their superior lessors, such consent not to be arbitrarily or unreasonably withheld. By Nov., 1935, the lease had by assignment become vested in a company called Moorstons, Ltd., and, on Nov. 13, 1935, Moorstons, Ltd., who were then carrying on a club, called "Jack's Club," on the said premises, entered into an agreement with the appellant, Mrs. Dorothy Pincott, of Court Club, 6, Albany Court Yard, London, to sell to her the goodwill of the club business and other property mentioned in cl. 1 of the agreement. Cl. 1 of the agreement enumerates the several items of property which Moorstons, Ltd., the respondent company in this appeal, agreed to sell, and that Mrs. Pincott agreed to purchase. One of the items of the sale was the goodwill of the business of the said club, another, No. 3, was the furniture, loose plant, implements, and utensils, signs, equipment, fixtures, and fittings, to which the vendor company was entitled, in connection with the said business, and another item was the leasehold premises described in the schedule thereto, and all licences held in connection therewith. The premises were described in the schedule as :

All those rooms comprising the whole of the two basements and also the ground floor of the premises known as No. 14, Orange Street, Leicester Square, in the county of London, together with all rights, easements, and appurtenances thereunto belonging, and the landlords' fixtures.

The date for completion was stated, in cl. 4 of the agreement, to be Nov. 27, 1935. The respondent company, which, for convenience, will hereafter be referred to as the vendor company, was unable to complete by the said date, but, inasmuch as the date of completion was not of the essence of the contract, its failure did not put an end to the contract. The appellant, hereafter for convenience called the purchaser, had paid to the vendor company £100 by way of deposit. The agreement of sale also contained the following clause, on the meaning and effect of which the result of this appeal depends :

The leasehold premises mentioned in the schedule hereto are assignable only with the consent of the landlords from whom the same are held, and the vendors shall use their best endeavours to obtain the requisite consent for the assignment thereof to the purchaser, and if such consent cannot conveniently be obtained the vendors shall, at the option of the purchaser, procure a declaration of trust of the premises in favour of the purchaser, or otherwise deal with the same as she shall direct.

Up to Dec. 16, 1935, the vendor company had not been able to procure the consent of its landlords to the assignment of the lease to the purchaser. There was no evidence to show that the company's landlords had acted either arbitrarily or unreasonably in refusing to assent

to an assignment to the purchaser. On Dec. 16, the purchaser gave a notice in writing to the vendor company, which reads as follows :

A As the contract for the sale by Moorstons, Ltd., to Mrs. Dorothy Pincott of, *inter alia*, the leasehold premises, 14, Orange Street, Leicester Square, dated Nov. 13, 1935, was agreed to be completed on or before Nov. 27, 1935, and the vendor company has not obtained the requisite consents to the assignment to the said Mrs. Dorothy Pincott, and she does not intend to exercise her option, contained in para. 5 of the said contract for sale, notice is hereby given to you on behalf of the said Mrs. Dorothy Pincott that, unless the necessary consents are obtained by the vendor company within 14 days from the service of this notice, the vendor company must be treated as having failed to complete its part of the contract, and will be required to repay to Mrs. Dorothy Pincott her deposit of £100 forthwith on the

B expiration of the said 14 days.
The time allowed by this notice was reasonable, in the circumstances.

The case was tried by BRANSON, J., who held that, if it had not been for cl. 5, the purchaser would have been entitled to rescind the contract and claim repayment of the deposit. With this part of the learned
C judge's decision it seems to me impossible to disagree.

A question then arose as to whether the vendor company had or had not protected itself from the consequences that would otherwise have followed from its failure to obtain from its landlords a licence to assign the lease to the purchaser by the time fixed by the notice of Dec. 16.

D BRANSON, J., held that the parties had specially provided for what was to happen in the event of the vendor company's failure to obtain the consent of its landlords, and that, taking the whole of the agreement together, the vendor company was entitled to say that as it could not conveniently or at all obtain the requisite consent for the assignment
E to the purchaser, it was entitled by cl. 5 to perform its contract by procuring a declaration of trust of the premises in favour of the purchaser, or otherwise dealing with the matter as the purchaser should direct, and that, as the purchaser undoubtedly refused to go on with the contract if the consent were not obtained, the purchaser broke her
F contract, and, by so doing, entitled the vendor company to retain the deposit. In my judgment, the learned judge was right in so holding.

My view as to the effect of the agreement is this. By cl. 1, item No. 4, standing by itself, the vendor company undertook an obligation to assign the leasehold premises. If, for any reason the company was unable
G to do so, it would, apart from cl. 5, have had to return the deposit. There might have been many difficulties in the way of its carrying out its undertaking to assign the leasehold premises, e.g., it might have been shown that the company was not the holder of the lease, or that it had forfeited its right to retain the lease, or that, for some cause other than
H failure to obtain its landlord's consent, it was unable to assign the leasehold premises. If the vendor company's inability to perform its undertaking to assign arose from any such cause as above-mentioned, it would have had no answer to the purchaser's claim to repayment of the deposit. But inability to assign by reason of failure to obtain the

landlord's assent is specially provided for by cl. 5, which bound both parties. In that event, the agreement was not to come to an end, but something else was to take the place of an assignment. It was by that clause agreed that the vendor company would give, and the purchaser would take, in lieu of an assignment, at her option, either (a) a declaration of trust, or (b) such other means of giving the purchaser a right to use the premises for the purpose of managing the club (the vendor company retaining the legal possession) as she should direct, e.g., by the grant of a licence. It was argued that this must be a misconstruction of the clause, as it would involve a forfeiture of the lease. In my opinion, the cases cited by Mr. St. John Field at the resumed hearing show that this argument is not well founded: see *Peebles v. Crosthwaite* (1), *Jackson v. Simons* (2), *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* (3), and *Chaplin v. Smith* (4). It seems to me that we must treat the law as correctly laid down in the judgment of ROMER, L.J. (then ROMER, J.), in *Jackson v. Simons* (2), at p. 380, where he says:

The defendant moreover retained the legal possession of the whole of the premises at all material times and, as pointed out by ROMER, J., in *Peebles v. Crosthwaite* (1), a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises.

For these reasons, I think the learned trial judge was right, and the appeal should be dismissed with costs.

SCOTT, L.J.: I have had the opportunity of perusing the judgment which GREER, L.J., has just read, and agree with his conclusion. It is unnecessary to repeat his *resumé* of the facts. As he said, the appeal depends upon the proper interpretation of a single clause of the sale agreement—cl. 5; and, as so often happens with an ill-drawn clause, it is not easy to feel completely confident of one's conclusion as to the meaning to be attributed to it. In the course of the argument I was disposed to think that the vendor company had not expressed itself with clearness sufficient to justify us in reading the clause as such an express modification of his absolute undertaking to transfer the leasehold title of the premises as would reduce his obligation to get the superior landlord's consent to a mere promise to use his best endeavours. The reasoning of the judgment of GREER, L.J., has, however, impressed me, and I now concur in his interpretation of the clause as expressly modifying the vendor company's absolute obligation. But I should like to describe in my own words my logical route to that terminus. Without some modification, the vendor company was at the mercy of the landlords: a reasonable refusal by the latter brought the sale to an end, and made the deposit returnable to the purchaser. The express insertion, in cl. 5, of the phrase "best endeavours" and "conveniently" seems to anticipate a modification of the absolute obligation. In the second

place, the express addition of a provision as to what was to be done in the event of the endeavours not succeeding, shows, beyond doubt, that alternatives to rescission of the contract had been under consideration between the parties. In the third place, if the latter half of the

A clause was not intended to keep the bargain still standing and effective, in spite of the non-success of the "best endeavours," it would have been so easy to add "but if the purchaser shall not so elect, the sale shall be cancelled and the deposit returned." In truth, I find it so difficult to think of any other reasonable construction of the clause, that I feel

B driven to the conclusion that the parties did intend to say that the transfer of the leasehold title should not be essential, provided always the vendor company had done its best to procure it. This is what BRANSON, J., thought.

I accordingly agree with the judgment proposed by GREER, L.J.

C

EVE, J. : Although I have shared the doubts of SCOTT, L.J., in this case, I have come to the conclusion that the appeal fails. I think the judge was right, and the following passage in his judgment best expresses my view :

D

In my view, it is plain that the plaintiff's advisers took the wrong view of her rights under this contract, and that, whereas she might, had she chosen, have called for a declaration of trust, or might, had she chosen, have demanded that they should grant her an underlease of this property and tried to get the consent of the lessors to that, she took none of the courses open to her to repudiate the contract, and consequently the contract is at an end. It has been put to an end by her action, and there seems to me to be no reason why she should recover the deposit, which,

E of course, by ordinary implication, is repayable if the vendor fails to fulfil his side of the contract, but forfeitable if the purchaser refuses to fulfil his side of the contract.

Appeal dismissed with costs.

Solicitors : B. L. Elman (for the appellant) ; Kenneth Brown, Baker,

F Baker (for the respondent company).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

Re ROBERTS'S WILL TRUSTS, YOUNGER v. LEWINS.[CHANCERY DIVISION (Crossman, J.), **January 22, 1937.**]*Trustee—Bank—Express charging clause—Settled legacy—Income fee—Withdrawal fee—Incidence.*

A
A testatrix appointed a bank executor and trustee of her will, and provided by her will that the bank should be entitled to remuneration in accordance with the bank's scale of fees in force at the date of the will. The testatrix then gave her trustees four capital sums settled upon certain trusts. A summons was taken out to determine whether the income fees and withdrawal fees payable to the bank in respect of the settled legacies were payable out of (i) the income or capital of such legacies respectively, or (ii) the residuary estate :—

B
HELD : the income fees were payable out of the income of the respective settled legacies, and the withdrawal fees were payable out of the capital thereof.

Re Hulton, Midland Bank Executor & Trustee Co., Ltd. v. Thompson (1) and *Re Riddell, Public Trustee v. Riddell* (2) distinguished.

C
D
E
[EDITORIAL NOTE. In this and the two recent cases which are here considered, two classes of gifts by will are distinguished in so far as the incidence of the income fee of a bank trustee is concerned. In the earlier cases there were gifts of an annuity, a fixed annual sum payable out of the general estate, and the income fee, payable in the one case to a bank trustee and in the other to the Public Trustee, was held to be payable wholly out of the estate after the annuity had been paid. In the present case the gift was of a settled legacy which is severed from the estate, and such income as the severed sum produced was to be paid to a tenant for life. The income fee was held to be payable out of the income of the legacy, as the residue's liability came to an end when the settled legacy was taken out of the estate. A further point arose in the present case with regard to the withdrawal fee payable at the termination of the trust. In the case of annuities this question does not arise. In the case of a settled legacy, there is a capital sum to be distributed at the termination of the life interests, and it was held here that this capital sum must bear the incidence of the withdrawal fee.

F
AS TO REMUNERATION OF TRUSTEES, see HALSBURY, 1st Edn., Vol. 28, Trusts and Trustees, pp. 162-164, paras. 335-337 ; and FOR CASES, see DIGEST, Vol. 43, pp. 773-775, Nos. 2136-2147.]

Cases referred to :

- (1) *Re Hulton, Midland Bank Executor & Trustee Co., Ltd. v. Thompson*, [1936] Ch. 536 ; [1936] 2 All E.R. 207 ; Digest Supp.
(2) *Re Riddell, Public Trustee v. Riddell*, [1936] Ch. 747 ; [1936] 2 All E.R. 1600 ; Digest Supp.
(3) *Re Bentley, Public Trustee v. Bentley*, [1914] 2 Ch. 456 ; 43 Digest 1035, 4761.
(4) *University College of North Wales v. Taylor*, [1908] P. 140 ; 44 Digest 241, 675.
(5) *Re Cassel, Public Trustee v. Mounibatten*, [1927] 2 Ch. 275 ; Digest Supp.
(6) *Re Hicklin, Public Trustee v. Hoare*, [1917] 2 Ch. 278 ; 43 Digest 1035, 4762.

H
ADJOURNED SUMMONS taken out by the trustees of the will of Elizabeth Roberts, for the determination of a number of questions arising on the construction of the will and in the administration of the testatrix's estate, including that of the incidence of certain fees payable to the

Westminster Bank, Ltd., one of the trustees of the will. The details of the will are fully set out in the judgment.

Wilfrid M. Hunt, for the plaintiffs, the trustees of the will, stated the facts.

A *H. L. A. Hart* (*Gerald Upjohn* with him) for the first defendant entitled to a life interest in one of the settled legacies.

P. H. L. Brough for the second defendant, interested in the capital of two of the settled legacies.

G. P. Slade for the third defendant, interested as a pecuniary legatee.

B *E. M. Winterbotham* for the last defendant, interested as a pecuniary and residuary legatee.

Hart: These fees must be treated as a legacy to the bank, and, that being so, should be charged on residue. The only relevant cases are *Re Hulton*, *Midland Bank Executor & Trustee Co., Ltd. v. Thompson* (1),
C *Re Riddell*, *Public Trustee v. Riddell* (2), and *Re Bentley*, *Public Trustee v. Bentley* (3), which was not followed in *Re Hulton* (1), and in *Re Riddell* (2).

The effect of these cases is that, if these fees be a legacy, and there is nothing in the will to show such an intention, there can be no justification for throwing them on other legacies. The result of thus charging one

D legacy against another is that the residuary legatee will cease to be such. The particulars of the fees charged by the bank are contained in a brochure published by the bank, and, though that may be looked at to determine the scale of the fees charged, it cannot be looked at to determine their incidence, since it is not incorporated in the will: see *University*
E *College of North Wales v. Taylor* (4).

Winterbotham: The whole brochure is admissible in evidence, as it forms the basis of the agreement between the testatrix and the bank, though I do not think it will be necessary for me to rely on this point.

F *Brough*: I am in the same interest as *Hart*. See *Re Cassel*, *Public Trustee v. Mountbatten* (5). What the testatrix has said in this case is that my client is to receive her share in the £1,000 settled legacy, not that she is to receive that share less certain fees.

G *CROSSMAN, J.*: I am administering the trusts of this estate and I could declare it reasonable that the costs of administration should be charged on the settled legacies, though it might not be possible to charge them on an annuity. What is the difference between this withdrawal fee and costs?

Brough: The withdrawal fee does not represent costs, but profit costs.
H The difference between such a fee and costs is that the latter is an entirely unknown factor. It is not proper to charge costs against settled legacies, but the practice is of such long standing that it must be taken to be an exception to the general rule. What your Lordship is suggesting was the basis of the view of *ASTBURY, J.*, in *Re Bentley*,

Public Trustee v. Bentley (3), which was not accepted by FARWELL, J., in *Re Riddell, Public Trustee v. Riddell* (2).

Winterbotham : The fallacy in the argument that the fees are payable out of residue is the suggestion that every direction in a will to pay such fees must necessarily be a legacy payable out of residue. If the argument is right, the profit costs of a solicitor, who is given power to charge such costs by the will, would have to be treated in the same way. Again, a direction that legacies are to be paid free of duty does not necessarily involve the duty being paid out of residue. In the case of specific legacies, or demonstrative ones payable out of a special fund, the duty falls on the same fund as the legacy. When a fee has to be paid, it is primarily payable out of the same fund as that out of which the legacy is payable. This is all that happens when a fee, payable in respect of an annuity payable out of the income of residue, is charged on residue, and this is the principle upon which *Re Hulton, Midland Bank Executor & Trustee Co., Ltd. v. Thompson* (1) was decided. *Re Riddell, Public Trustee v. Riddell* (2), being a case in which the Public Trustee was concerned, does not affect a case where a bank is concerned, but FARWELL, J., there said that fees such as the ones in this case were administration expenses of the whole estate, because they were paid in respect of an annuity payable out of the whole estate. See also *Re Hicklin, Public Trustee v. Hoare* (6). Although it is true that an administration expense in relation to the estate as a whole must be paid out of residue, in ordinary cases the expenses of a trust legacy, once it has been set aside out of residue, must be borne by that legacy.

Slade : I am in the same interest. The income fee is a percentage fee chargeable on income received, and the withdrawal fee is a percentage fee chargeable on the capital distributed. One would have expected, therefore, that, unless there was some equitable reason to the contrary, the person to bear the income fee would be the person for whom the income was collected. But it is necessary also to see what is the fund whose income is being distributed. Where there is an entire fund, the fee is charged on income as a whole, but, if income is distributed in shares, it is borne proportionately.

CROSSMAN, J. : Para. 5 of the originating summons in this case raises the following question :

Whether the income fees payable to the plaintiff bank in respect of the income of the said settled legacies and the withdrawal fees so payable in respect of such legacies are payable out of (i) the income or capital of such legacies respectively, or (ii) the testatrix's residuary estate, and, in the latter event, that it may be determined what fund ought to be set aside to cover such fees.

The testatrix by her will appointed the Westminster Bank, Ltd., as one of her executors and trustees, and made the following declaration :

And I declare that the bank shall be entitled to remuneration in addition to the

customary share of brokerage, in accordance with the bank's scale of fees now in force free from duties.

- Then she bequeathed by paras. 6, 7, 8 and 9 of her will—or in substance bequeathed, because what she did was to direct her trustees to invest—
- A four capital sums of money, which were to be held upon trust to pay the income to tenants for life, and, after the death of the tenants for life, to hold the corpus upon trust for the persons therein named. Then she gave her residue upon the usual trust for conversion and to pay her debts and legacies, to pay certain sums out of residue, and to divide the
- B ultimate residue between certain relatives.

- The Westminster Bank, Ltd., which was appointed a trustee, had, at the date of the will, issued a brochure, as it is called, entitled: "Wills, Trust and Settlements. The Westminster Bank as Executor or Trustee." That brochure contains, among other things, the terms and conditions
- C upon which the Westminster Bank will accept the office of executor and trustee of wills. In order to find out what was meant by the declaration in the testatrix's will that "the bank shall be entitled to remuneration in addition to the customary share of brokerage, in accordance with the bank's scale of fees now in force," I have to look at this document, and
- D I find that the bank, when acting as trustee or executor, charges three sorts of fees: (i) an acceptance fee, which is a capital fee charged when it takes over the trust; (ii) an income fee, which is a charge on the income actually received while the trust is continuing; (iii) a withdrawal fee, which is a capital fee charged when the trust comes to an end, and
- E the trust funds are distributed.

- The question raised by the summons, as amended, relates only to the income fee and the withdrawal fee, and it has been argued before me, on behalf of the persons interested in the income and capital of one or more of the settled legacies, that the result of the declaration in the will
- F is that the income fee ought to be paid out of the residuary estate, and that the withdrawal fee, on the distribution of the settled legacies, should also be paid out of the residuary estate. The argument, I think, or the really substantial part of the argument, in support of that contention, is based upon the suggestion that the Westminster Bank, Ltd., is a
- G legatee of this remuneration, and that, being a legatee of the remuneration, it ought to be paid, like an ordinary legacy, out of residue. I do not know whether, really, that is the whole of the case, but it is also suggested, I think, on the authority of CLAUSON, J., and that of FARWELL, J., that this remuneration ought to be paid out of residue.
- H The cases which have been referred to, in my view, do not bind me in any way, or affect this case, because both the decision of CLAUSON, J. in *Re Hulton, Midland Bank Executor & Trustee Co., Ltd. v. Thompson* (1), and that of FARWELL, J., in *Re Riddell, Public Trustee v. Riddell* (2), relate to an annuity. It seems to me that there is all the difference

between a trust to pay an annuity, or a gift to an annuitant, as there was in those cases, and a trust, or a direction to set aside a capital sum and deal with income and capital, such as we have in this case. Where you have a gift of an annuity, it seems to me quite obvious that the annuity is payable in the first instance clear, and that the residue out of which the annuity is to be paid bears any charges which come after the annuity. The annuity must be paid first, and one finds in the judgment of CLAUSON, J., that he lays stress upon that. He says, at p. 542 :

In my view, on this will—and the same observation would apply to any will in which there is an annuity charged on the fund—it is perfectly clear that the persons who are interested in the income, other than the annuitant, are to have nothing until the annuity is paid in full.

That seems to me to be perfectly clear, and I agree respectfully with the learned judge in that case that it was so, and that the annuity must be paid in full in the first instance. The difference here is that I do not have an annuity payable, but I have certain sums directed to be taken out of residue, and these sums, when they are taken out, are held on certain trusts. But it seems to me that the residue's liability has come to an end when these sums have been taken out of the estate, and, the duty upon them having been provided for, they are set aside and invested. After that, I have in this case four separate trust funds, which have to be dealt with as trust funds, and, that being so, I do not think I can charge residue with what are really expenses incurred in connection with these separate trust funds. The income fee, in my judgment, is really an expense in connection with the income of those trust funds, and the withdrawal fee is another expense in connection with capital of those funds, and it seems to me that both these expenses, in the absence of express direction to the contrary, must be borne by the trust funds. I think exactly the same point would arise if, as was suggested to me in argument, new trustees of these trust funds were appointed. I do not think it could be suggested that the costs of appointing a separate set of trustees, in place of the original set of trustees, of one of these trust funds could be thrown upon residue, when, perhaps many years hence, it was desired to sever one of these trust funds. But exactly the same argument would apply, I think, in the case of the withdrawal fee in respect of one of these trust funds being made payable out of residue. I think that this is quite a different case from the case of an annuity. There is no question here of a residuary donee of income. The tenant for life of each of these shares is the tenant for life of the whole of the income, and takes the whole. It is not a gift of income, and the tenant for life getting the residue of the income. Again, there is no balance of income, as CLAUSON, J., said. The residuary estate is not treated as something which is left after the income of this particular fund is dealt with.

On the whole, I come to the conclusion that both the income fee payable in respect of the income of the settled legacies and the withdrawal fee on the capital ought to be borne by the settled legacies. The income fee, I think, should come out of income of the settled legacies, and the
 A withdrawal fee out of the capital of the settled legacies. The acceptance fee is something which comes out of the estate as a whole, that is, before the legacies are settled at all, and I think the reference to the acceptance fee had better be struck out of the summons. Costs of all parties as between solicitor and client to come out of the estate in due course of
 B administration. Liberty to apply.

Solicitors: *Syrett & Sons* (for the plaintiff, and the first, second, and last defendants); *Sharpe, Pritchard & Co.*, agents for *Archibald Loy*, *Doncaster* (for the third defendant).

C [Reported by C. M. YOUNG, Barrister-at-Law.]

SMITH v. BENABO.

D [KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 12, 27, 1937.]

Highways—Metropolis—Streets—Erection of dead shores—Without leave or licence from local authority—Hoards or scaffolding—Metropolitan Paving Act, 1817 (c. xxix), s. 75—Metropolis Management Act, 1855 (c. 120), ss. 122, 123.

E *Statutes—Repeal—By implication—Alteration of penalties—Metropolitan Paving Act, 1817 (c. xxix), s. 75—Metropolis Management Act, 1855 (c. 120), ss. 122, 123.*

The respondent was charged with unlawfully erecting two dead shores in a public street in the metropolitan police district without a licence first had and obtained from the local authority, contrary to the Metropolitan Paving Act, 1817, s. 75. The magistrate dismissed the information on the ground that sect. 75 was a prohibition against the erection of any posts, bars, rails, boards, or other things by way of inclosure only, and the dead shores were not erected by way of inclosure and were not hoards or scaffolding; but he rejected the respondent's contention that the section of the Metropolitan Paving Act, 1817, was repealed by the effect of the Metropolis Management Act, 1855, ss. 122, 123 :—
 F
 G

HELD: (i) the Metropolitan Paving Act, 1817, s. 75, was repealed by the effect of the Metropolis Management Act, 1855, ss. 122, 123, and by sect. 247 of that Act, and the proceedings were therefore wrongly taken under a statute which had been repealed.

H (ii) the dead shores could properly be described as hoards or scaffolding for the purposes of both statutes.

[EDITORIAL NOTE. The Metropolitan Paving Act, 1817 (commonly called Michael Angelo Taylor's Act), s. 75, is impliedly repealed by the Metropolis Management Act, 1855, ss. 122, 123, 247. It had already been decided in *Fortescue v. St. Matthew, Bethnal Green, Vestry* (1), that sect. 72 of the former Act was impliedly

repealed by sect. 119 of the 1855 Act. The further question whether posts, bars, etc., must form an inclosure to be within the prohibition in the Metropolis Management Act, 1855, s. 122 is left open as it was not necessary for the purposes of this case to decide it.

AS TO HOARDINGS, see HALSBURY, Hailsham Edn., Vol. 16, p. 425, para. 611; and FOR CASES, see DIGEST, Vol. 26, pp. 516, 517, Nos. 2195, 2196, and p. 567, Nos. 2599-2604.] A

Cases referred to :

(1) *Fortescue v. St. Mathew, Bethnal Green, Vestry*, [1891] 2 Q.B. 170; 26 Digest 513, 2173. B

(2) *Michell v. Brown* (1858), 1 E. & E. 267; 42 Digest 767, 1935.

APPEAL by way of case stated against a decision of a metropolitan magistrate sitting at Thames police court, dismissing an information preferred against the respondent, charging her with setting up in Wicker Terrace, Stepney, two dead shores without obtaining a licence from the borough engineer and surveyor contrary to the Metropolitan Paving Act, 1817, s. 75. The facts are set out in the judgment. C

N. L. C. Macaskie, K.C., and *Thomas Dawson* for the appellant.

John H. C. Goldie for the respondent. D

GODDARD, J. : The judgment I am about to read is the judgment of the court.

This is a special case stated by a metropolitan magistrate, sitting at Thames police court, who dismissed an information preferred against the respondent, charging her with setting up in Wicker Terrace, Stepney, two dead shores without obtaining a licence from the borough engineer and surveyor, contrary to the Metropolitan Paving Act, 1817, s. 75. The dead shores consisted of two baulks of timber, 8 ft. long, and between 6 ins. and 7 ins. by 4 ins. square, and supported another baulk or girder about 15 ft. long, which rested upon them, and the dead shores were so set up to support a house while structural repairs were in progress. These dead shores encroached upon the footway of the said street. The section under which the respondent was summoned, omitting words which are immaterial for present purposes, provides that no person shall erect, in any street or other public place within the jurisdiction of the Act, any hoard or scaffolding, or place or erect any posts, bars, rails, boards, or other thing, by way of inclosure, for the purpose of making mortar, or of depositing or sifting, screening, or slacking any bricks, stone, lime, sand, or any other materials for building or repairing houses, or for other works, or for any other purpose, without leave or licence of the surveyor of the pavements of the district, who, it is provided, shall issue a licence, specifying certain conditions, on payment of a fee. Then the section provides that, if any person erects any such hoard or scaffolding E F G H

or any inclosure, posts, bars, or rails, or any other matter or thing for the purpose aforesaid, or any other purpose, without a licence, he shall be liable to a penalty of 10s. a day during the time that the erection continues, and power is given to the local authority to remove the erection. The section also gives directions as to how the material out of which it is to be constructed is to be disposed of by the local authority.

At the hearing, the facts were not in dispute and the contentions of the respondent can be grouped under two heads. First, it was submitted on her behalf that the section under which she was summoned was repealed by the effect of the Metropolis Management Act, 1855, ss. 122, 123 ; and, secondly, that the dead shores were not hoards or scaffolding and that, insofar as the section prohibited the erection of posts, bars, rails, boards, or other things, without a licence, these dead shores were not put up by way of inclosure, and therefore no licence was required. The learned magistrate, who did not have the advantage of an argument as full as that which counsel addressed to this court, and to whom the case of *Fortescue v. St. Matthew, Bethnal Green, Vestry* (1) was not cited, ruled against the respondent on the first point, and in her favour on the second. The court have already intimated that in their opinion the contention of the respondent that the section has been repealed is correct ; and it is therefore unnecessary to express any opinion whether the learned magistrate was right in his view that the prohibition affecting posts, boards, and the like applies only where they form an inclosure. But, in our opinion, these dead shores can properly be described as hoards or scaffolding for the purposes of both the Metropolitan Paving Act, 1817, and the Metropolis Management Act, 1855. One of the objects of the Act of 1817 was to deal with obstructions to the footpaths and pavements of the metropolis, and we see no reason for holding that these words were intended to have a technical or limited meaning. A construction that may be placed upon such words, for the purpose, for instance, of the Workmen's Compensation Acts, is not necessarily that which is to be applied when a wholly different class of statute is being considered. Now, the Act of 1817 was a private Act, often known as Michael Angelo Taylor's Act, after a prominent politician, the member for Poole, who introduced it and carried it through the House of Commons. It is true that, by sect. 148, it is to be deemed a public Act, of which judicial notice is to be taken ; but, before sect. 9 of the Interpretation Act provided that judicial notice should be taken of private as well as of public Acts it was a common device to insert some such provision in a private Act, to obviate the necessity that formal proof of it should be given, when it came in question in the courts. In the days before 1855, many private Acts were obtained by the vestries of London, conferring powers of local government upon them, and no doubt one of the reasons which led to the

passing of the Metropolis Management Act in that year was the desirability of securing a uniform code and uniform administration throughout the rapidly growing district comprised in the metropolis as defined by the Act. Sect. 122 of that Act provides in substance that it shall not be lawful to erect or set up in any street any hoard or fence or scaffold for any purpose whatever, nor any posts, bars, rails, boards, or other thing, by way of inclosure for making mortar or depositing building materials or rubbish without a licence from the clerk or surveyor of the local authority, and the licence is to contain the same particulars as were required in a licence granted under the earlier Act. Sect. 123 provides penalties different from, and more severe than, those provided in the Metropolitan Paving Act, and there is also some difference in the provisions as to the pulling down and disposing of an offending structure. Sect. 247 expressly repeals all Acts in force in any parish to which the Act extends, so far as their provisions are inconsistent with those of the later Act. Apart from the provisions of this latter section, it is a well settled rule of construction that, if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute : see *Michell v. Brown* (2). A useful illustration of this rule was cited by Mr. Goldie, *Fortescue v. St. Matthew, Bethnal Green, Vestry* (1), to which we have already referred. The two Acts there in question were the same as those which we are now considering and the court held, after reviewing all the authorities, including the passage from *Michell v. Brown* (2), to which we have referred, that sect. 119 of the Act of 1855 impliedly repealed sect. 72 of Michael Angelo Taylor's Act, the subject matter being the same, while the penalties and procedure were different. Now, in our opinion, sect. 122 of the Metropolis Management Act in substance describes exactly the same offence as that which is described by the Metropolitan Paving Act, 1817, s. 75. That there is some difference in the wording of the two sections is true, but the object and the subject matter are the same, and we do not consider that the presence in the latter section of some general words of the earlier Act, which do not appear in terms in the later Act, prevents the application of the doctrine to which we have referred. Substantially, the two sections deal with the same offence ; and sect. 123 provides for different penalties, and some difference in procedure, from those imposed and prescribed by the earlier Act. It follows that, in the opinion of the court, the Metropolitan Paving Act, 1817, s. 75, is repealed, both by reason of the rule to which we have referred, and by the Metropolis Management Act, 1855, s. 247. But, so that there may be no misapprehension, we think it well to emphasise that this judgment gives no countenance to the idea, if it exists, that persons are at liberty to erect such structures as were erected in this case without a licence from the local authority. All that we decide is that proceedings were

taken under a statute which has been repealed, instead of being taken under one which is now in force.

The appeal therefore fails, and must be dismissed with costs.

Appeal dismissed with costs.

A Solicitors: *Edward Fail* (for the appellant); *C. V. Young & Son* (for the respondent).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

B

RUSSELL v. BEESLEY.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 12, 1937.]

C *Street Traffic—Speed Limit—Evidence of exceeding limit—Corroboration—Road Traffic Act, 1934 (c. 50), s. 2 (3).*

D The respondent was charged with driving a motor car on a road in a built-up area at a speed greater than 30 miles per hour. The appellant, a police inspector gave evidence that he followed the respondent's car in another car for a distance of about a mile and a half and that the inspector's speedometer showed that the speed of his car varied between 35 and 42 miles an hour. A police officer also gave evidence that he tested the speedometer on the appellant's car and that it was correct. No evidence was tendered by or on behalf of the respondent, who submitted that there was no corroboration of the appellant's evidence as required by the Road Traffic Act, 1934, s. 2. The appellant contended that the evidence was sufficient as it was coupled with the evidence of the accuracy of the speedometer. Without ruling upon the submissions made by the parties, the justices dismissed the charge, "being of opinion that in cases of this kind it is not desirable that the evidence of a police officer checking a person's speed from the speedometer in his own car should be accepted unless corroborated by another witness present at the time" :—

F HELD: (i) although the respondent's submission was incorrect in point of law, the justices were wrong in laying down what purported to be a new rule of law of universal application, as there was no rule of law requiring corroboration in the circumstances of the case.

(ii) as, but for the justices' decision, the respondent might have desired to call evidence by way of answer, the proper course was to remit the case back to the justices to hear and determine it according to law.

G [EDITORIAL NOTE. As stated in the judgment this case does not lay down any rule of law; but, on the contrary, negatives the existence of a rule that the evidence of one police officer as to speed of a motor vehicle checked by his speedometer requires corroboration.

H AS TO SPEED LIMIT, see HALSBURY, 1st Edn., Vol. 27, Street and Aerial Traffic, pp. 523, 524, para. 682; and FOR CASES, see DIGEST, Vol. 42, pp. 870-872, Nos. 198-207.]

APPEAL by way of case stated against a decision of justices for the county of Warwick, dismissing an information laid against the respondent charging him with driving a motor car on a road in a built-up area at

Wilnecote, on May 11, 1936, at a speed over 30 miles an hour. The facts are set out in the judgment of LORD HEWART, L.C.J.

Donald Hurst for the appellant.

The respondent was not represented.

LORD HEWART, L.C.J. : This is a case stated by justices for the county of Warwick. The facts are extremely simple. An information was preferred by the present appellant against the present respondent for driving a motor car on a road in a built-up area at a speed greater than 30 miles per hour. The justices dismissed the information, and it appears that the evidence which was offered was evidence on the part of the inspector of police himself, that along the road in a built-up area he himself for a distance of a mile and a half or thereabouts followed the defendant's car in another car, and that according to the inspector's speedometer the speed of his car varied between 35 and 42 miles an hour. More than that, evidence was given by a police officer that he tested the speedometer on the inspector's car, immediately after the occurrence at 20 and 30 miles an hour, and that it was correct. That was the state of the evidence for the prosecution, evidence of the police inspector with reference to a speedometer, the accuracy of which was deposed to by another witness. In that state of the evidence a submission was made on the part of the respondent that there was no corroboration of the appellant's evidence as required by the statute. On the part of the appellant, the inspector, it was contended that his evidence was sufficient, because it was coupled with the evidence of the accuracy of the speedometer by another witness.

Now the justices really evaded the point, and, instead of ruling upon the submission in the terms in which it was made, they formulated a new rule for themselves, a rule of universal application, as they thought. Their words are :

We being of opinion that in cases of this kind [not in this particular case] it is not desirable that the evidence of a police officer checking a person's speed from the speedometer in his own car should be accepted unless corroborated by another witness present at the time dismissed the information without giving any opinion upon the legal point raised.

Having taken that course, the justices state this case for the purpose of asking this court whether they came to a correct determination in point of law. It is a little difficult to see what is the determination referred to. The determination which they set out is that they gave no opinion on the legal point. It is quite obvious, in the state of the evidence here disclosed, that the submission made on the part of the respondent was incorrect in point of law. It is equally obvious, and indeed even more obvious if there are degrees of obviousness, that the universal rule purported to be laid down by these justices is also incorrect in law. There is no rule of law that it is desirable that the evidence in these

circumstances should be corroborated. There is no rule of law that corroboration is necessary; and if the conclusion of the justices is to follow from their premises, they must mean, when they say it is not desirable, that it is not lawful that the evidence should be accepted without corroboration of another kind. It seems to me to be quite clear that these justices have misdirected themselves, not indeed in deciding upon the submission which was made, because they refrained from deciding upon it, but in substituting for the proposition which was being contended for another quite untenable proposition of their own. Nevertheless, as this chapter of accidents had the effect of bringing the case to a premature termination, it is conceivable—I say no more—that but for this error the respondent would have desired to offer some evidence by way of answer. In those circumstances the appropriate course seems to be that the appeal should be allowed, and that the case should go back to the justices, with the direction to them that their opinion as expressed in the case is erroneous in point of law, and that they should hear and determine the case according to law.

SWIFT, J. : I agree.

D

GODDARD, J. : I agree. I do not think that we are laying down any rule here at all. The justices may convict upon the evidence of one policeman. They may refuse to convict on the evidence of one policeman, if they are not satisfied with his evidence. These justices have put forward a view which cannot be upheld, and it does not seem to me they have ever come to a decision on the fact, aye or no, whether the offence was proved or not.

Appeal allowed, and case remitted back to the justices with a direction that their opinion was erroneous in point of law and to hear and determine the case according to law.

Solicitors : Sharpe, Pritchard & Co., agents for J. Alan Turner, Warwick (for the appellant).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

LEWIS v. PLUNKET.

[CHANCERY DIVISION (Farwell, J.), **January 15, 1937.**]*Mortgage—Discharge—By Statutes of Limitations—Return of documents of title to mortgagor.*

In Mar., 1921, the plaintiff mortgaged certain freehold property, of which she was the owner, to the defendant as security for a loan, and the title deeds relating to the property were duly handed over to the defendant. The plaintiff continued in possession of the property. One payment of interest under the mortgage was made in Nov., 1921, and thereafter no payment of interest or principal was made. A letter dated July 17, 1936, relied upon as an acknowledgment, was held not to be so:—

HELD: (i) all the estate or interest of the defendant in the property which had from time to time been vested in the defendant under the mortgage had by virtue of the Real Property Limitation Act, 1833, s. 34, and the Real Property Limitation Act, 1874, s. 1, ceased and determined at the expiration of 12 years from 1921.

(ii) even if there had been an acknowledgment after 12 years and before 20 years had elapsed, it would not have been sufficient to restore the estate or interest in the land which the defendant had as mortgagee under the mortgage.

(iii) in any event, in the absence of an acknowledgment, the personal remedy under the mortgage had also determined.

(iv) as the plaintiff alone had any right of any sort or kind, legal or equitable, to the property in question, she was entitled to the title deeds.

[EDITORIAL NOTE. All documents of title having been handed to the mortgagee in the usual way upon the execution of the mortgage, the question here arises as to their return when the title of the mortgagee has been extinguished by the Statute of Limitations. The position is explored as to how far a right to sue upon the covenant to pay in the mortgage could be an answer to a claim for the return of the documents.

AS TO RIGHT OF MORTGAGOR TO RETURN OF DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 499, 500, para. 735; and FOR CASES, see DIGEST, Vol. 35, pp. 610-612, Nos. 3474-3494.]

Cases referred to:

- (1) *Clayton v. Clayton*, [1930] 2 Ch. 12; Digest Supp.
- (2) *Crow v. Tyrrell* (1818), 3 Madd. 179.
- (3) *Kibble v. Fairthorne*, [1895] 1 Ch. 219; 32 Digest 471, 1353.
- (4) *Re Hazeldine's Trusts*, [1908] 1 Ch. 34; 32 Digest 484, 1468.
- (5) *Hervey v. Wynn* (1905), 22 T.L.R. 93; 32 Digest 413, 911.
- (6) *Harrington v. Price* (1832), 3 B. & Ad. 170; 38 Digest 709, 535.
- (7) *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; 38 Digest 743, 883.
- (8) *Manners v. Mew* (1885), 29 Ch. D. 725; 35 Digest 477, 2111.
- (9) *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273; 35 Digest 610, 3475.

ACTION for (a) a declaration that all such estate or interest in the hereditaments formerly subject to a mortgage dated Mar. 18, 1921, and made between the plaintiff of the one part and the defendant of the other part as has from time to time been vested in the defendant by virtue of the said mortgage has been extinguished, and that the defendant has now

- no estate or interest in the said hereditaments; (b) delivery by the defendant to the plaintiff of the said mortgage and all other such title deeds relating to the said hereditaments as are in her possession or control or payment of the value thereof, and in either case damages for the
- A** detention thereof; (c) as an alternative or in addition to (b) damages for the conversion of any such title deeds relating to the said hereditaments as have at any time been in the possession or control of the defendant as mortgagee of the said hereditaments and have been converted by the defendant to her own use or damages as compensation for the
- B** loss or destruction of any such title deeds.

The defendant denied that her interest had been extinguished, and she relied upon a letter from the plaintiff dated July 17, 1936, as an acknowledgment of the mortgage and of all the defendant's rights thereunder, and she counterclaimed for an account of the moneys due to her under

C the mortgage and for foreclosure or sale. The facts are set out in the judgment.

Norman Daynes, K.C., and M. Gravenor Hewins for the plaintiff.

R. Cozens Hardy Horne for the defendant.

- Daynes, K.C.* : The mortgagee's rights are now completely extinguished ;
- D** the Real Property Limitation Act, 1874, s. 1, and the Real Property Limitation Act, 1833, s. 34 : *Kibble v. Fairthorne* (3), *Re Hazeldine's Trusts* (4), and *Hervey v. Wynn* (5). The position remains the same under the new law. The mortgagee gets the title deeds because he gets the legal estate : Law of Property Act, 1925, s. 83. The right of the mortgagee
- E** to documents depends upon his having the fee simple : *Harrington v. Price* (6) ; *Clayton v. Clayton* (1) ; *Re Cooper, Cooper v. Vesey* (7) ; *Manners v. Mew* (8).

- Horne* : The plaintiff must show that (a) she has got the legal estate ; (b) there is no reason why the defendant should be entitled to retain the
- F** deeds as against her. The only way in which the documents can be recovered is by an action for redemption : *Bank of New South Wales v. O'Connor* (9). There is nothing in the statutes to extinguish the covenant to pay the debt. The plaintiff has not got the legal estate, and a mortgagor is not entitled to recover possession of the documents except
- G** on the payment of the amount due. In any case the mortgagor cannot be entitled to the mortgage deed.

- FARWELL, J.* : This action raises an interesting question which has been well argued by counsel on both sides. The question arises in
- H** somewhat unusual circumstances, and it is not for me to make any comment on the circumstances which give rise to the claim. I am merely concerned to decide what are the legal and equitable rights of the parties in the matter.

In 1921, the plaintiff was in occupation as a tenant of a house known

as Salwick, Seabrook Road, Hythe, Kent. An opportunity arose which would enable her to purchase the property for £2,000. She was unfortunately not in a position to find the whole of the purchase price herself and she obtained from the defendant, who is now Lady Plunket, and was in 1921 Mrs. Barnato, a loan of £1,600. That loan was secured **A** to the defendant by a mortgage dated Mar. 18, 1921. The deed was made between the plaintiff, therein called the borrower, of the one part, and the defendant, therein called the mortgagee, of the other part. After reciting that the mortgagee agreed to lend the sum of £1,600 upon having the repayment thereof with interest thereon at the rate thereafter men- **B** tioned secured in manner thereafter appearing, it was witnessed that in pursuance of the agreement and in consideration of the sum of £1,600, which the borrower acknowledged, the borrower as beneficial owner granted unto the mortgagee in fee simple certain freehold property known as Salwick and situate in Seabrook Road, in the borough of **C** Hyde, in the county of Kent, subject to a proviso for redemption upon payment on Sept. 18, 1921, of the said sum of £1,600 and interest thereon in the meantime at the rate of 6 per cent. per annum. It was further provided that the borrower covenanted with the mortgagee to pay on Sept. 18, 1921, £1,600 with interest at 6 per cent., and if not paid to pay **D** interest by equal quarterly payments until the principal was repaid. There was also a covenant by the borrower to keep the property in repair and to insure all buildings and perform the restrictions relating thereto as described. Then, by cl. 4, there was a provision that all costs, charges, and expenses properly incurred under the mortgage by the mortgagee **E** or her assigns and all moneys properly paid by her or her assigns should, together with interest thereon at the rate thereafter mentioned, be charged on the property for the time being subject to that security, and should on the same being paid be repaid on demand to the mortgagee or her assigns by the borrower or her assigns with interest thereon from **F** the time of payment at the rate of 6 per cent. per annum, and until such demand should be made and complied with the borrower should in part payment of such interest pay to the mortgagee interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid.

The position, therefore, was that the plaintiff obtained a conveyance **G** to herself of the property in question, and immediately before the date of the mortgage she was the owner in fee simple in whom vested the legal estate in this property, but on the execution of the mortgage the legal estate became vested in the defendant as mortgagee, the plaintiff having the equity of redemption as mortgagor. On one occasion the plaintiff **H** paid interest under the mortgage. The date of that payment was Nov. 2, 1921. That was the one and only payment of interest which the plaintiff ever made under the mortgage deed. Nothing was done—neither was interest paid nor was any payment made at all—nor was

there any acknowledgment, so far as appears from the pleadings, of any sort or kind given by the plaintiff to the defendant with regard to the mortgage until 1936. The defendant seems to have been satisfied to permit the plaintiff to remain in possession of the property and to take
A no steps either to recover the interest which was due to her from time to time, nor to do what she could have done, proceed to take the necessary steps to foreclose the mortgage. She allowed matters to drift on and, it may be out of friendship's sake, because the plaintiff and the defendant were at that time on very friendly terms, nothing further was done
B about it until 1936. Then the plaintiff was desirous of borrowing money, and the only method apparently she could think of for raising money was on the security of this particular property, and for that purpose she required the title deeds. The title deeds were in the possession of the defendant and had been in the possession of the defendant as mortgagee
C ever since the date of the mortgage. No claim to them had ever been made by the plaintiff, and they had remained in the ordinary course in the possession of the defendant. The plaintiff, having consulted her solicitors, proceeded to write to the defendant a letter dated July 17, 1936, in these terms :

D My dear Dorothy,—Am writing you upon a little matter which just concerns us two about Salwick. With my heavy loads to carry I am in need of raising some money and am obliged to give security to my bank manager, who has often suggested that he would not object to my overdraft if I could deposit some security with him such as the deeds of my property. I wonder if you would help me out by letting me have the deeds of Salwick because Cranley Court was mortgaged in order to purchase same and I cannot borrow more on it. Will you think this over and let me know if you care to do this for me ? With love and best wishes to you and yours, Madeline Lewis.
E

That letter is the only letter which is relied on or pleaded as being an acknowledgment to take this case out of the Statutes of Limitation. That letter was not answered, and it is not perhaps surprising that the
F defendant did not answer it or comply with the request in it. After some other little correspondence between the solicitors, on Aug. 27, 1936, this writ in this action was issued. By the writ the plaintiff claims :

G (a) a declaration that all such estate or interest in the hereditaments formerly subject to a mortgage dated Mar. 18, 1921, and made between the plaintiff of the one part and the defendant of the other part as has from time to time been vested in the defendant by virtue of the said mortgage has been extinguished, and that the defendant has now no estate or interest in the said hereditaments ;

H (b) delivery by the defendant to the plaintiff of the said mortgage and all other such title deeds relating to the said hereditaments as are in her possession or control or payment of the value thereof, and in either case damages for the detention thereof.

Then, thirdly, as an alternative, or in addition to that, she claims damages for the conversion of the title deeds. It is not now seriously disputed that the plaintiff is entitled to the first relief which she seeks, namely, a declaration that all the estate or interest in the hereditaments

which has from time to time been vested in the defendant under the mortgage has ceased and determined. It is, I think, quite plain that by virtue of the Real Property Limitation Act, 1833, s. 34, and the Real Property Limitation Act, 1874, s. 1, on the expiration of 12 years from 1921 the mortgagee, the defendant, ceased to have any estate or interest whatsoever in the land. In my judgment, it is plain on the authorities that, even had there been an acknowledgment of any kind since that date, it would not have been sufficient to restore to the mortgagee the estate or interest which she had as mortgagee under the mortgage, but in this case there is not any sort of acknowledgment at all. In my judgment, it is plain that, so far as the property itself is concerned, the only person who now has any right or title to the property is the plaintiff, and she has that right or title freed and discharged from any claim which the defendant had by virtue of her mortgage or otherwise. Accordingly the plaintiff is entitled to the first declaration which she seeks, and she has now a title which is a good title as against the whole world. But it is said, however that may be with regard to the right of the defendant so far as the land itself is concerned, her right under the covenant for payment may not have finally determined because it might revive, as it were, or still be in existence if there was an acknowledgment even after the date of the statutory period. It is not necessary for me to determine that question because, in my judgment, it is impossible to treat the letter of July 17, 1936, as an acknowledgment at all. The letter is obviously one written with care, I think probably under advice, and although it is no doubt a claim or a request to the defendant to hand over the title deeds, and it may be an admission that the defendant had the title deeds, it cannot be read as an admission that the plaintiff owes the defendant money under the covenant or otherwise. It is quite plain that, in the absence of an acknowledgment, the personal remedy under the covenant in the mortgage has now also determined, and the defendant is in no position to claim relief in respect of the covenant from the plaintiff.

It was suggested in addition that, by virtue of the provisions in the mortgage with regard to the costs, charges and expenses, some expenses have been incurred by the defendant in connection with the letter of 1936, and that thereupon arose a new charge which the defendant is now entitled to enforce. In my judgment, any costs, charges and expenses which may have been incurred in connection with that letter were not costs, charges and expenses of the mortgagee within the clause at all, and it is quite unnecessary, therefore, for me to pursue that matter any further.

The question, and the real question, of difficulty in this case is as to the claim for delivery up of the title deeds. In my judgment, where a person is in possession of property with a title both beneficial and legal which is

good against all the world and an indefeasible title in law and in equity, *prima facie* that person is entitled to possession of the title deeds of that property. Without doubt there are cases in which the court will not order delivery up of title deeds to a person who is the legal owner of the property. The whole matter was considered with great care by MAUGHAM, J., in *Clayton v. Clayton* (1), and, as his lordship pointed out in that case, the absolute ownership in the land does not necessarily carry the right to the title deeds. Although I entirely accept that as a correct statement of the law, in my judgment, it is true, as I think it is pointed out by MAUGHAM, J., himself, to say that *prima facie* an absolute owner is entitled to the title deeds. MAUGHAM, J., pointed out at p. 18 :

It is no doubt true that the immediate freeholder has both in law and in equity a *prima facie* title to the possession of the title deeds. He may maintain an action of detinue against any person who withholds them from him after demand made.

Then he went on to say :

It is going too far, however, to suggest that the fee simple owner has always a right to the title deeds, for it appears to be settled that he may, if he pleases, give them away By parity of reasoning he could no doubt destroy them.

Then he dealt with other cases. As I understand that judgment, the learned judge is saying that, although there is a *prima facie* right in the absolute owner to have possession of the title deeds, there are cases in which he may not be entitled to assert successfully that right. It appears that a claim in equity by the owner of property to recover title deeds would lie before the Judicature Act on a claim which would be a purely equitable claim. It is also clear that in those days before the Judicature Act no claimant in equity could succeed in recovering title deeds, unless he could show that he was in possession of the property, and if it was a question in dispute whether he was properly in possession or not, that not being a matter with which the court of equity could deal, it was essential for such a claimant to establish his title in a court of law before he could assert his title to the title deeds. That, as I understand it, is really the effect of the case of *Crow v. Tyrrell* (2). SIR JOHN LEACH, V.-C., in that case said at pp. 181, 182 :

An heir out of possession is entitled to a discovery of deeds necessary to support his legal title, or to have terms put out of his way which may impede his recovery at law ; but this bill, although the plaintiff is an heir out of possession, does not pray the aid of this court in order that he may assert his legal title, but prays immediate relief, by the delivery of the possession of the estate and of the title deeds. It is not denied, that if this bill had prayed the delivery of the possession of the estate only, that the demurrer would hold ; because this court cannot relieve upon a legal title. But it is said that the delivery of title deeds is equitable relief ; and that this court, having in that respect jurisdiction, will do complete justice. The possession of the title deeds is incidental to the possession of the estate, but cannot be recovered with the estate at law. This court, therefore, will give the title deeds to him who has at law recovered the possession of the estate ; but its jurisdiction in this respect is confined to the possessor of the estate. If this plaintiff recovers the estate at law, then, and not till then, he may come here for the possession of the title deeds. All the cases prove this.

The demurrer was allowed. That case does decide that, although a court of equity could not entertain an action for possession of the property which depends in part on a legal title, if a legal title could once be established the person having the legal title could file a bill in equity and could in those proceedings recover the title deeds in question. SIR JOHN LEACH, V.-C., seemed to have thought by the way his judgment is expressed that once possession is proved to the satisfaction of the court of equity, *prima facie*, at any rate, the possessor is entitled to recover the title deeds by means of an equitable action. I have no doubt that that is the class of action to which MAUGHAM, J., was referring when he said in *Clayton v. Clayton* (1), at p. 18, he could file a bill for recovery of them. That must be a bill of equity and such an action as is referred to by SIR JOHN LEACH, V.-C., in *Crow v. Tyrrell* (2). One, therefore, starts with this, that, *prima facie*, a person who is in possession of an indefeasible title in land ought to be put into possession also of the title deeds of that land. It is said on behalf of the defendant in the present case that no claim to recover the title deeds can succeed unless it is shown that the legal estate is in the claimant. In my judgment, the legal estate is in this case in the person who is in possession of the property, that is, the plaintiff. It is quite true that the effect of the Statutes of Limitation is not to convey property from the person in whose possession it was unto the trespasser or the person who acquires it by virtue of those Acts, but, on the other hand, one gets this position, that the estate, whether it be legal or equitable or both, of the original mortgagee or the original owner, as the case may be, is put an end to once and for all by virtue of the Statutes of Limitation. That person no longer has any right to assert any title to the property either at law or in equity. His rights have wholly ceased and consequently he ceases to have a legal estate or an equitable estate in the land in question, and the person in whom the land is vested, because he is in possession of the land with an indefeasible title, has acquired a legal estate which is a good estate as against everybody. If it be necessary for the plaintiff in a case such as this to establish that he or she has the legal estate vested in him or her, then, in my judgment, that has been shown in this case. But in any event the position is this. The plaintiff has satisfied me that she, and she alone, has any right of any sort or kind, legal or equitable, to the property in question, and, *prima facie*, she is, in my judgment, entitled to the title deeds.

Then it is said that some reason must be shown why the defendant should not retain the title deeds and that in the absence of any such reason the court will not grant the plaintiff the relief sought. In my judgment, there is reason here why the order should be made for the delivery up of the title deeds. One may be permitted to say that one has some sympathy with the defendant, and perhaps she is not unnaturally

- anxious to retain any rights which she properly has. When one comes to consider the position of affairs the reasons for the handing over of the title deeds to the plaintiff are not, I think, far to seek. The defendant, if I am right in the view which I take of the law, has now and has for some
- A** time ceased to have any interest in this property at all. Therefore the title deeds can be of no possible use to her and there is no reason at all why she should retain them as against the person who is the owner of the property. There is therefore a reason, and, in my judgment, a sound reason, why the defendant should not in a case of this kind be entitled
- B** to retain the title deeds. I am not suggesting in this case for one moment that, so long as the title deeds remain in the hands of the defendant, any wrong use would be made of them, but if the title deeds get into other hands it might be possible for the person into whose hands they came to use them for improper purposes and to perpetrate frauds on persons by
- C** producing the title deeds and holding himself out as a legal owner of the property. That seems to me to be a real reason why in a case of this sort, where the plaintiff is the sole owner of the property, the title deeds should go to that person and should not be retained by any other person. In such a case as that before MAUGHAM, J., there were special reasons why
- D** the title deeds should not be handed over. There are other cases where similar considerations might apply. But in the present case there is no real reason at all why the defendant should retain the title deeds. There is a reason why she should not and, in my judgment, in those circumstances I ought to make the order which the plaintiff asks, and
- E** to order the defendant to hand over to the plaintiff the whole of the title deeds relating to the property in question which are now in her possession. That being so, the plaintiff having succeeded in this action, she is entitled to the costs of the action and the counterclaim must be dismissed, with costs.
- F** Solicitors: *Willes, Gladstone & Reid Sharman* (for the plaintiff); *Agar-Hutton, Butcher & Co.* (for the defendant).

[Reported by LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

UNION CARTAGE CO., LTD. *v.* HEAMON.
EGGLETON *v.* HEAMON.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January, 28, 1937.]

Street Traffic—Motor vehicle—Construction and use—Trailer attached—Additional person in attendance—Road Traffic Act, 1930 (c. 43) s. 17—Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77.

The appellants were charged with unlawfully permitting a motor tractor, with trailer attached, to be driven on the road without a person, in addition to the driver of the vehicle, for the purpose of attending the trailer, contrary to the Road Traffic Act, 1930, s. 17, and the regulations made thereunder. The Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77, provides that: "The requirements of the Road Traffic Act, 1930, s. 17, with regard to the employment of drivers and attendants shall not apply . . . (c) where a motor tractor is drawing—(i) any closed trailer specially constructed and used for the conveyance of meat between docks and railway stations, or between wholesale markets and docks or railway stations." Although it was generally used for the conveyance of meat between docks and railway stations or between wholesale markets and docks or railway stations, for which purpose it had been specially constructed, on the date of the alleged offence the trailer was loaded with, and was being used for the conveyance of tiles. The appellant contended that, by reason of reg. 77, no offence had been committed, and that, alternatively, in so far as that regulation purported to refer to the user of a trailer, it was *ultra vires* :—

HELD : (i) the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77, was within the powers conferred upon the Minister of Transport by the Road Traffic Act, 1930.

(ii) as the trailer was at the material time carrying tiles and not meat, it was not within the exemption in reg. 77 (c) (i), and an offence had been committed against the Road Traffic Act, 1930, s. 17.

[EDITORIAL NOTE.] This case raises the question as to when it is necessary in the case of a motor vehicle having a trailer attached to it that there should be a man, in addition to the driver of the vehicle, to attend to the trailer. The regulations made remitting the rigour of the statutory provisions were attacked on the ground that they had no relation to the construction of such vehicles but only to the use of them, but they were not for this reason held to be beyond the statutory power of the Minister. On the point taken on the nature of the merchandise being carried, this case may be compared with that of *Flatman v. Poole*, p. 495 *ante*.

AS TO THE NUMBER OF ATTENDANTS, see HALSBURY, 1st Edn., Vol. 27, Street and Aerial Traffic, p. 312, para. 647; and for THE REGULATIONS, see STONE'S JUSTICES' MANUAL, 1936, pp. 2132, 2133.]

APPEAL by way of case stated against a decision of the justices sitting in the city and county of Bristol under the Summary Jurisdiction Acts, 1857 and 1879.

On Aug. 1, 1936, a servant of the appellant company one Robert Eggleton (the appellant in the second case) was, in accordance with the instructions of the appellant company, driving a motor tractor, which was drawing a trailer, on a highway known as Coronation Road, Southville, in the city and county of Bristol. Apart from Eggleton, there was no other person carried on the tractor or on the trailer for the purpose

of attending to the trailer, which was of a closed type, and was specially constructed for the conveyance of meat between docks and wholesale markets and railway stations, and was generally used for this purpose.

- A On July 30, 1936, the trailer had been used for conveying meat from London Docks to wholesale markets at Cheltenham and Gloucester, and, between the said date and Aug. 1, 1936, the trailer had been drawn empty to Bridgwater, in the county of Somerset, in order to pick up a load of tiles, which it did. On Aug. 1, 1936, while being drawn along Coronation Road aforesaid, the trailer was loaded with the tiles so picked up at B Bridgwater, and was in fact being used for the conveyance of such tiles to London. The brakes of the trailer were controlled from the tractor and not otherwise.

The Road Traffic Act, 1930, provides :

- C 17. (2) Where a motor vehicle other than a heavy locomotive or a light locomotive is drawing a trailer or trailers on a highway, one person, in addition to the driver of the vehicle, shall be carried either on the vehicle or on a trailer for the purpose of attending to the trailer or trailers.

(4) If any person causes or permits a motor vehicle or trailer to be driven or drawn in contravention of this section, he shall be guilty of an offence.

(5) The Minister may by regulation vary the requirements of this section in respect of any class or description of motor vehicles or any class or description of trailers.

- D 30. (1) The Minister may make regulations for any purpose for which regulations may be made under this part of this Act, and for prescribing anything which may be prescribed under this part of this Act, and generally as to the use of motor vehicles and trailers on roads, their construction and equipment, and the conditions under which they may be so used and otherwise for the purpose of carrying this part of this Act into effect. . . .

- E The Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77, provides :

The requirements of the Road Traffic Act, 1930, s. 17, with regard to the employment of drivers and attendants shall not apply in the following cases, that is to say—

- F (c) where a motor tractor is drawing—(i) any closed trailer specially constructed and used for the conveyance of meat between docks and railway stations or between wholesale markets and docks or railway stations.

- G The appellants contended that, by reason of the said reg. 77 (c) of the 1931 regulations, the Road Traffic Act, 1930, s. 17, did not apply to the said tractor and trailer ; that, alternatively, by sect. 17 (5) of the Act of 1930, the Minister may by regulation vary the requirements of this section in respect of any class or description of motor vehicles, or any class or description of trailers, and that, in so far as reg. 77 (c) aforesaid purported to refer to the user of a trailer, the same was *ultra vires* ; and that the appellant had therefore not committed an offence.

- H The respondent contended that an offence had been committed unless the case fell within the provisions of reg. 77 (c) aforesaid ; that the case did not fall within its provisions, because, at the time in question, the trailer was not being used for the conveyance of meat, and that it was irrelevant to consider to what use the trailer was generally put ; that there was nothing to prevent the Minister from defining, limiting, or

designating the class of trailer, for the purpose of the regulation, by reference, *inter alia*, to the user to which such trailer might be put, and that the regulation was not *ultra vires*; that, even if the regulation was *ultra vires* by reason of the reference to user, the whole regulation would therefore be void, and an offence would have been committed; and that A the appellant company had, therefore, committed an offence.

The justices were of opinion that reg. 77 (c) did control the user of the trailer, and, in so doing, was *intra vires*, by reason of the powers conferred on the Minister by sects. 17 and 30 of the Act of 1930. They therefore convicted the appellant company, and imposed a fine of £1. Thereupon B this appeal was brought.

L. Herrick Collins for the appellant company.

Roland Oliver, K.C., and *David Karmel* for the respondent.

LORD HEWART, L.C.J. : The Road Traffic Act, 1930, s. 17 (5), provides that the rigour of the requirements of that section may, if the Minister thinks fit, be varied or modified by regulations, and, accordingly, the Minister gives a limited exemption from the universal obligation. Having been empowered by sect. 30 (1) to make : C

regulations generally as to the use of motor vehicles and trailers on roads, their construction and equipment and the conditions under which they may be so used and otherwise for the purpose of carrying this part of this Act into effect— D

the Minister by the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 77, mitigated the rigour of the universal rule for certain purposes, which provided, *inter alia*, that the requirement with regard to the driver and attendant should not apply in certain cases—in the first place, where a motor tractor is drawing any closed trailer, specially constructed and used for the conveyance of meat, between docks and railway stations, or between wholesale markets and docks or railway stations. The whole argument is that that regulation is *ultra vires*, for the reason that it has regard not merely to the question of construction of the vehicles, but also to the use of them. That seems to be a very ungrateful argument to put forward. The argument is that, if a particular class of vehicle is admittedly subject to the rigour of the general regulations, you must remove the requirement wholly. You may not say that this class of vehicle, with a class of trailer, when it is being used for the purpose of trade, need not have an attendant. In other words, the word “vary” in sect. 17 (5) is to be restricted in its meaning, or you should wholly do away with it, and wholly do away with the requirement of the section in relation to the particular class of vehicle. That is quite obviously not the meaning of the section, and it seems to me that the regulation is manifestly within the powers conferred by the section of the Act. It seems to me to be the position that the Minister could not excuse the absence of an attendant for a particular purpose without excusing his E F G H

absence for all purposes. I imagine that in no case could his absence be permitted. The argument, therefore, fails, the appeal is dismissed, and the magistrates' decision upheld.

A SWIFT, J. : I agree.

GODDARD, J. : I agree.

Appeal dismissed with costs.

B Solicitors : *Robbins, Olivey & Lake* (for the appellant company) ;
Mawby, Barrie & Letts (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

C

REED v. CATTERMOLLE (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
January 28, 29, February 1, 1937.]

D *Income Tax—Income under Sched. E—Rent-free occupation of house—Minister of religion.*

A minister of the Methodist Church was required by the constitution of that Church to reside in the house provided for him by the circuit. The house was acquired by the circuit who paid the minister his stipend, furnished the house, decorated it, repaired it, and in fact paid (or repaid to the minister) the Sched. A tax assessed upon it. The minister was strictly required to live in the house provided by the circuit, whether suited to his needs or not. The appointment and dismissal of the minister was not a matter for the circuit, but for the annual conference, by whom he could be removed without notice. The question was whether the minister was taxable under Sched. E in respect of his occupation of such a house, treating it as a part of his remuneration :—

F HELD : as the minister lived in the house, not for his own convenience, but because he was required to live in it in performance of the obligations which he owed to the Church as part of his service, the house could not be treated as part of his remuneration for the purpose of Sched. E.

[EDITORIAL NOTE. The previous cases upon ministers' houses were much considered in the House of Lords in *Inland Revenue Commissioners v. Miller* (4), and there the House definitely rejected the criterion of a right in the occupier of the premises to let them or otherwise turn the annual value thereof into money. The question in such cases is therefore whether the occupier has the beneficial occupation of the property or is merely required to occupy them as part of his agreement with the actual owners thereof. This is the first occasion, since the decision in the House of Lords above referred to, upon which this question has arisen in respect of a minister's house. That case itself however was concerned with a widow's occupation of property under the trusts of a will.

H FOR RENT-FREE OCCUPATION IN RELATION TO INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 265, para. 533 ; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to :

- (1) *Hartland v. Diggines*, [1926] A.C. 289 ; 28 Digest 88, 506.
- (2) *Tennant v. Smith*, [1892] A.C. 150 ; 3 Tax Cas. 158 ; 28 Digest 17, 87.
- (3) *Russell v. Town & County Bank* (1888), 13 App. Cas. 418 ; 2 Tax Cas. 321 ; 28 Digest 45, 227.
- (4) *Inland Revenue Comrs. v. Miller*, [1930] A.C. 222 ; 15 Tax Cas. 25 ; A Digest Supp.
- (5) *Dobson v. Jones* (1844), 5 Man. & G. 112 ; 30 Digest 521, 1758.
- (6) *Hughes v. Chatham Overseers, Burton's Case* (1843), 5 Man. & G. 54, 77 ; 30 Digest 521, 1757.
- (7) *Smith v. Seghill Overseers* (1875), L.R. 10 Q.B. 422 ; 30 Digest 521, 1761.
- (8) *McDougall v. Sutherland* (1894), 3 Tax Cas. 261 ; 28 Digest 90, case 536 i. B
- (9) *Corke v. Fry (Inland Revenue v. Fry)* (1895), 3 Tax Cas. 335 ; 28 Digest 87, case n.
- (10) *Tollemache v. Inland Revenue Comrs.* (1926), 11 Tax Cas. 277 ; Digest Supp.
- (11) *Sutton v. Inland Revenue Comrs.* (1929), 14 Tax Cas. 662 ; Digest Supp.
- (12) *Nicoll v. Austin* (1935), 19 Tax Cas. 531. C
- (13) *R. v. Catt* (1795), 6 Term Rep. 332 ; 38 Digest 454, 207.
- (14) *R. v. Munday* (1801), 1 East, 584 ; 38 Digest 452, 184.
- (15) *R. v. Green* (1829), 9 B. & C. 203 ; 38 Digest 452, 185.

APPEAL by the Crown from a judgment of LAWRENCE, J., delivered in the King's Bench Division on May 26, 1936, and reported in [1936] 2 All E.R. 526. D

The facts are fully set out in the report of the judgment of LAWRENCE, J., and in that of the Court of Appeal.

The Attorney-General (Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant. E

Cyril L. King for the respondent.

The Attorney-General : The question whether the respondent is taxable under Sched. E is a question of fact for the commissioners. Moreover, the respondent is in beneficial occupation of the manse, an emolument within Sched. E. F

The fact that an employee is required to reside in a particular house makes no difference, for the essential test, for the purpose of deciding whether the occupation is a beneficial occupation of the employee or remains the occupation of the employer, is that the premises must be part of the premises of the employer. If the minister here is the occupier, G he is liable to pay rates, and also to pay income tax under Sched. A. All the cases in which an employee is required to reside in a certain house for the purposes of his employment are distinguishable. The essential fact is not that the employee is required to live there, but that the premises where he is required to live must, if the occupation is to be H that of the master, be part of the master's other and larger premises. This case is governed by *Inland Revenue Commissioners v. Miller* (4), *Tollemache v. Inland Revenue Commissioners* (10), *Sutton v. Inland Revenue Commissioners* (11), and *Nicoll v. Austin* (12). The minister

has all the amenities of these premises that any other occupier could have. The true test is, not how he came to be in the premises, but what he does with them. A mansion may be devised by will on condition that the devisee lives in it, but he is none the less assessable to income tax.

If an employee is on the domain of the employer, the occupation is that of the employer, but if he is outside the employer's domain, the occupation is the employee's. The question is one of fact. This minister had all the rights of an occupier, including the vote.

LORD WRIGHT, M.R. : The real test seems to be whether the employer is keeping the premises by means of his employee.

The Attorney-General : The test submitted by the Crown is whether the rooms are provided as a dwelling-house conveniently near the place of business, or as a place where some portion of the work can be performed.

Hills, following for the Crown : The minister is clearly a rateable occupier, entitled to a vote. A person occupying under a trust for the purposes of the trust always occupies for himself ; the trustees never occupy through him for themselves. When the court is inquiring whether a separate right of occupancy over the premises has been given and there has been complete surrender of enjoyment by the previous occupier, then the question of fact, whether the premises are part of larger premises or not, may be very material. According to RYDE ON RATING, 1930, 6th Edn., p. 34, the question of whether a person has separate occupation or not depends very largely on whether, as a matter of fact, he has a separate enjoyment. This, in its turn, may depend on whether the premises are part of larger premises. If a person occupies two rooms in a building, his enjoyment will probably be controlled by the owner of the entirety; but he may by arrangement be given complete enjoyment. The question is, whether the tenant is conducting his own dwelling-house, or is merely a lodger, under the control of another person.

This is not a master and servant case. The house is provided, and intended to be provided, as a dwelling-house for the minister, and he has the full enjoyment of it as a dwelling-house. Every principle of law requires that he should be treated as an occupier. He is not the servant or agent of the owner ; he is the person towards whom as beneficiary the trust of the dwelling-house is directed. There is no principle of law which requires that he should not be treated as occupier, or which prevents a judge of fact from treating him as occupier. The motive with

which a person enjoys a dwelling-house is wholly immaterial ; the test is whether the enjoyment is exclusive. In *R. v. Catt* (13), a school-master who lived in a house under a trust was held to be an occupier. In *R. v. Munday* (14) and *R. v. Green* (15), tenants of almshouses were held to be occupiers. If a house is intended under a trust to be occupied

by somebody, that person is *prima facie* the occupier. The purpose for which he occupies the premises is irrelevant.

King was not called upon.

LORD WRIGHT, M.R.: In this appeal from the judgment of LAWRENCE, J., notwithstanding the very able and interesting arguments that we have heard from the Attorney-General and from Mr. Hills I feel that the judgment of LAWRENCE, J., which is a very careful judgment, is right, and should be affirmed; and, indeed, I agree very completely with the way in which he has dealt with the question.

The case has some special features. The question is whether a minister, a Wesleyan, or rather now a Methodist Church minister, is assessable, under Sched. E, to an amount which corresponds with the Sched. A tax on the manse which he occupies, in circumstances which I shall explain in a moment. The way in which the question specifically arises is this. He is the occupier of the manse—I use the word “occupier” in a non-technical sense—but the Sched. A tax, together with the local rates, and the water rate, which, for this purpose, need not be specially distinguished, are paid by the Church, if, for the moment, I may so describe the position. Now, it is well established, and it was held by the House of Lords in the case of *Hartland v. Diggines* (1), that, where the income tax is paid, in circumstances for this purpose comparable, on behalf of the person whom it was sought to assess, it may be added to his emoluments for the purpose of an assessment under Sched. E. The Crown contends that, in the present case, as the appellant is the occupier of the manse under Sched. A, and therefore is liable to be assessed under Sched. A as occupier of the house under rr. 1 and 2, and is thereby relieved of paying something which he ought in law to have paid, his emoluments are to be treated as enhanced accordingly. That proposition as a proposition of law is not contested by the Crown. The Crown says that in this case he is the occupier for the purpose of Sched. A. On the other hand, it is said, on behalf of the appellant before the judge, the respondent here, that he is not, for the purpose of Sched. A, the occupier, but merely has the enjoyment of premises in such circumstances that he is not liable for Sched. A tax or for local rates or water rate at all, and therefore, that these sums cannot be added to his emoluments, but must be disregarded. The question which has to be decided, namely, whether he is the occupier or not, is, in one sense, a question of fact, that is to say, the answer can be ascertained only by a careful consideration of all the circumstances of the case, but it is obvious that, in order to investigate the facts, it is necessary to determine what are the correct principles of law, and therefore, although the question in one sense is a question of fact, it is one which depends upon the application of the appropriate principles of law, and it is one of those questions which are

often described, not very happily, as mixed questions of fact and law. In this particular case, as I read the findings of the commissioners, they have stated their conclusion as a question of law for the court. That is found in para. 8 of the case :

A We, the commissioners who heard the appeal, held that the appellant's occupation of the manse was beneficial, and that the said sum equal to the Sched. A tax, together with the amounts representing water rate and local rates thereon, formed part of his emoluments of office, for the purposes of income tax assessable upon him under Sched. E.

The learned judge has rather approached the matter upon the footing
B that, upon the detailed facts set out in the case, there is no evidence on which that conclusion can be arrived at. I prefer to say that there is a question of law raised on the facts as stated, and that it depends on what view is taken of the law whether the decision of the commissioners is to be upheld or not. But, however, the question is stated, it comes
C to the same thing for all practical purposes. The learned judge has come to a conclusion contrary to that arrived at by the commissioners, and it is from that conclusion that this appeal is brought.

There is one point I may pass over at once. It appears that in the Sched. A assessment book the Rev. Joseph Reed, the respondent in
D these proceedings, the appellant before the learned judge, is entered as occupier of the premises in question, and it is also occupied as for the Wesleyan Methodist Church, the owner of the house in question. It is not suggested that the respondent here was any party to, or had any knowledge of, that entry. The Attorney-General has very properly
E stated that he does not rely on that fact, and that it must be ascertained, from all the circumstances of the case, whether the respondent was in occupation, in the proper sense of the term, for the purposes of deciding the present question. Now, the question which is raised depends on the principles which have been considered in a number of cases which
F have been brought to the notice of the court, and the question may be stated very summarily in this way. The respondent is undoubtedly living in the house in question as a dwelling-house—it is occupied as a dwelling-house—but it is said that his user of the house as a dwelling-house, though to that extent it may, or possibly may not, be for his
G advantage or convenience, or his enjoyment of the premises, is ancillary to and for the purposes of the Methodist Church, which, in a sense, he serves in his capacity as pastor and minister. It is said that, in those circumstances, his possession, his enjoyment of the premises, is for the benefit of the Church ; his occupation is the Church's occupation, and
H the Church, and the Church alone, is properly assessable as occupier, both for income tax and for the purpose of rating. On the other hand, it is said that he is actually in the enjoyment of the premises, and dwells in them, and gets full use of them, and, that being so, he is the occupier in the relevant sense. It appears from the case that this gentleman,

the present respondent, was appointed by the Wesleyan Methodist Conference to be a minister of the Wesleyan Methodist circuit in 1930. That statement introduces two terms: one is the conference and the other is the circuit—I shall in future call the Church the Methodist Church, which it appears now is the correct appellation, owing to the merger which has taken place. The conference, as it is called, the Annual Methodist Conference, is a body which has vested in it general control of the Methodist Church; it consists of *ex officio* members and of elected representatives of districts, which are divided into circuits. A circuit, therefore, is a sub-division of the area covered by the conference as a whole. The circuit in question, of which the respondent is minister, comprises a number of churches, two at Redhill, two at Reigate, and one at Meadvale, Earlswood, Bletchingley, South Merstham, and Horley. The house in question, “Westerley,” Crossland Road, Redhill, is the manse provided for the minister of that circuit. The house itself is vested in trustees; that is not expressly stated in the case, but it appears, I think, sufficiently from what is set out in para. 5 of the case. That paragraph says:

Each circuit may consist of any number of churches, and acts through a representative committee called the quarterly meeting which appoints at least two administrative lay agents called circuit stewards. These officers are responsible for seeing that the financial needs of the circuit are met. The circuit, acting through its quarterly meeting, provides the minister's stipend, and buys, takes on lease, or otherwise provides a manse, in which the minister appointed to the circuit is required to reside, and from which he carries on his work, which consists of preaching, pastoral work, and administration.

I gather from that, applying the general statement to this particular case, that the house is provided by the circuit, and we were told that the property was vested in trustees. Whether that is so or not is not material, because the case sets out quite clearly that the minister, the respondent here, is neither the owner nor the lessee of the premises in question. He is, however, required to reside there, and that is the centre from which he carries on his widely spread and multifarious activities in pursuance of his ministry. The case proceeds to say that he is not:

allowed to sublet the manse he occupies nor to make any profit out of his occupation, and the cost of furnishing, decoration and repairs of a manse is borne by the circuit. In the present case the Sched. A tax, the rates and the water rate were defrayed by the circuit stewards out of moneys provided by the quarterly meeting out of contributions from the churches in the circuit. It is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit whether it is suitable for him or not in order that he may perform his duties. The average stipend is less than £300 per annum so that only in an exceptional case could a married minister afford to live elsewhere than in the manse provided. It is usual for a minister to remain on a circuit for not less than 3 years and not more than 6 years. The circuit has no power of appointment or dismissal, but the appointment may be terminated by the conference at any time without previous notice.

Now, I treat the Church here as the occupier of the manse. It is not necessary to apportion the different functions between circuit and conference. If the minister was in law in occupation of these premises,

then no question has been raised that the owner of the property (which may be compendiously, not perhaps very accurately, described as the Church, or, it may be, the trustees, or one or other of them) will fulfil the position of the occupier for tax purposes. No question, as I follow, A has been raised on that point, and it is argued for the revenue authorities that the minister is the occupier in the full sense of the term. Now, the judge has held that is not so, and, as I have already said, I agree with his conclusion. The essence of the matter, I think, is that the enjoyment which the minister has of this house, the enjoyment in the sense that he B uses it as a dwelling-house, and therefore in the sense that it is a benefit to him, is subsidiary and ancillary. He dwells in the house, not for his own convenience—we do not know in this case whether it would have been more convenient for him to live in a house or in a residence of a simpler character—but in fact he lives there, for the purposes of the C Church, as part of the obligations which he owes to the Church as part of his service, and under the compulsory requirement of the Church, as it is said, whether it is suitable for him or not, in order that he may perform his duties. In those circumstances, the authorities, as well as the principles which have been laid down, to my mind involve the view D that he is not the occupier for revenue purposes.

Now, let me refer to the cases to which the attention of the court has been drawn. There are two cases in the House of Lords which it may be convenient to refer to at once. One is the case of *Tennant v. Smith* (2), where the person it was sought to charge as occupier was the E agent of a bank, and the premises in question were premises of the bank. The question arose there in slightly different context, because the question was whether the annual value of the premises ought to be added to the remainder of his income in order to ascertain his total income for tax purposes, but the same question was raised, namely : was he in occupation F in the eyes of the law ? It was held that he was not. I pass over a number of observations in which stress is laid on the fact that he could not sub-let the premises, and that his enjoyment of the premises could not be turned into money in any sense. That, I venture to think, is not now a relevant test, but, on p. 158, LORD WATSON states the G position in this way :

The appellant is not a proprietor, neither is he an occupier within the meaning of Sched. B. The bank are the only occupiers, being, as LORD HERSCHELL said, in *Russell v. Town & County Bank* (3), “in the same position as if that portion of their bank premises were used in any other way in the strictest sense for the purposes of the bank and the business of the bank.” The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of H performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master’s dwelling-house or business premises instead of occupying a separate residence of his own.

Then, to the same effect, LORD MACNAGHTEN says this, on p. 162 :

The next point to be considered is what is the nature of the appellant’s occupation

of the residence provided for him in the bank premises. From the case stated for the opinion of the Court of Exchequer in Scotland it appears that "the appellant is bound, as part of his duty, to occupy the bank house as custodian of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours." He is not entitled to sub-let the bank house or to use it for other than bank business and in the event of his ceasing to hold his office, he is under obligation to quit the premises forthwith. Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Sched. A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay. A

Now, I think the principles laid down there apply to this case. It is perfectly true that, in that case, the dwelling in which the bank agent lived was a part of the bank premises, but I do not regard that as in any sense essential to the determination of this issue. The question is whether the dwelling-house in this case is being used for the purposes of the Methodist Church, and whether the respondent lives in it for the purpose of performing the duty which he owes to the Church. I do not find that the question that the premises so dwelt in are part of the larger premises belonging to the employer, if I may so call him, has ever been emphasised as an essential feature of the matter. It was not so emphasised in this case. It is mentioned as part of the actual facts, but I have not found it referred to as essential in any other case which has been cited to me, and I do not know of any such case, so I do not think it is of the essence of the matter at all. If you take as an analogy the case of coachmen, or chauffeurs, or gardeners, where cottages are provided within the close or curtilage of the employer, it can equally happen that the employer provides a cottage outside his close or curtilage, but in a position convenient to him for the performance by his servant of the duties for which he is employed. I cannot regard as an essential the question of this body providing a dwelling-house in a larger place. In this particular case, it is obvious that the area which the ministrations of the respondent have to cover extends over a considerable sphere. There are a great number of churches which he has to serve, and no doubt the members of the circuit whose spiritual welfare he has to look after are spread over a considerable distance in space, and the house was chosen no doubt as being conveniently placed for the purposes of the circuit. B C D E F G

The other case in the House of Lords to which we have been referred is an entirely different case, and is only important by way of contrast. It is *Inland Revenue Commissioners v. Miller* (4). The facts there may be very shortly stated to be these. Lady Miller was occupying a house—and I use the term in a neutral sense—a mansion house and policies free of rent and taxes. Her late husband had, in his will, directed his trustees to allow her so to do under certain conditions, and the question was whether she was assessable in respect of that occupation, and whether its value should be included as part of her total income for H

purposes of assessment to super-tax. It was held by the House of Lords that she was so assessable, and the gist of the matter is put very shortly by LORD BUCKMASTER, who says at p. 229 :

Her occupation was in her own right and she was not occupying as the representative of the trustees.

A A little above, he had said that the position was not affected by the circumstance that she was entitled "to have the taxes paid by the trustees." It was a clear case, and it seems to me, on the judgments in the House of Lords, though there was some difference in the courts below, a case in which she occupied, and had a beneficial right under the will to enjoy full occupation, so long as the conditions of the trust applied. She was not occupying for the purpose of discharging any duty, or doing any service to any one else, and I can see no reason now why it should not be held that the charges were to be added to her total income. On p. 236, VISCOUNT DUNEDIN says of *Tennant v. Smith* (2) :

C The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation, but the bank's occupation and the tax due under Sched. A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean.

D There again I think the same principles are stated, though, no doubt, with reference to the particular facts there in question, and with reference to the case of a caretaker ; all those different illustrations are there merely instances of a general principle, namely, was the occupation of the bank by the agent his own occupation, or was it in truth the occupation of the bank employer, or the occupation of the persons who were being served by the agent. Now, that that is the true view appears from a number of cases, but I shall refer to a few only. In *Dobson v. Jones* (5) the question was whether the appellant was entitled to be entered on the voting list, and the question stated there was whether he was a tenant of certain premises within the meaning of the Franchise Act then current, and it was held that he was not. He was a surgeon at the Greenwich Hospital, and he had a house in the infirmary in the hospital appropriated to him as surgeon. The surgeons who were not resident within the hospital were allowed a weekly sum as lodging money ; there was no exchange of apartments allowed, and the repairs were done by the commissioners. Those were the facts. I want to refer to the statement of principle in that case, by TINDAL, C.J., where he referred at p. 120, to an earlier and somewhat similar case, *Hughes v. Chatham Overseers, Burton's Case* (6) :

H [In *Hughes' case* (6)] we drew the distinction between those cases where officers or servants in the employment of government are permitted to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are required to occupy them, with a view to the more efficient performance of the duties or services imposed upon them.

I think the latter statement applies to this particular case.

TINDAL, C.J., is referring back to what is said on p. 78 in *Hughes'* case (6):¹

But it may be, that a servant may occupy a tenement of his master's, not by way of payment for the services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. A

The converse case on the facts is *Smith v. Seghill Overseers* (7). I refer to it because it contains a statement of the same principle as that which I have extracted from the other cases. In that case, a colliery provided B a number of houses for the benefit of its workmen, and filled up those houses at their discretion, giving preference to married men:

A workman could not go into a house without the owner's concurrence, but he was not in any way bound to live in any one of those houses. C The headnote says:

It was not absolutely necessary for a workman to live in one of the houses to perform his work.

It was held that there the workman was a tenant. The principle is stated in this way, at p. 429: D

The colliery owners desire that the married workmen should reside near the works, but that does not change the relation between the parties; unless the men are required to live in the houses for the better performance of their duties, it does not convert the occupation of a tenant into that of a servant. The governing principle is that, in order to constitute an occupation as a servant, it must be an occupation ancillary to the performance of the duties which the occupier has engaged to perform. Here the occupation is not connected with the performance of the employment, and the appellants, therefore, occupy as tenants. E

I do not know what distance of space there was in that case between the actual pit-head and the cottage, but that circumstance is not treated as relevant from one or the other point of view. The only other cases F to which I need refer are two cases which, unfortunately, cannot be regarded as of any assistance. They are two cases from the Scottish courts, subsequent to *Tennant v. Smith* (2)—at least, they were both almost contemporaneous. One is *M'Dougall v. Sutherland* (8). In that case, that was a question again of whether the income of the minister G did or did not reach a point which would deprive him of the benefit of abatement, and, in order to ascertain the true figure, it had to be considered whether the annual value of the manse which he occupied was to be taken into account in calculating his total income. It was held by the court there that he was not occupying as a tenant, and that the H annual value was not chargeable. The decision of the case, however, depended upon the view which the court took of certain expressions of opinion in *Tennant's* case (2), which had been decided, and had been before the court when the matter came before the Inner House, or Court

of Exchequer in Scotland. That court put its decision on this ground :
LORD ADAM said at p. 265 :

A It does not appear to me that the right to occupy a dwelling-house on these terms is one which was intended to be convertible into money. I think, therefore, that the principle of the case of *Tennant v. Smith* (2), applies to this case and that the value of the manse ought not to be added to the respondent's income.

B In respect of that case LORD BUCKMASTER expressed his disapproval. He said *M'Dougall v. Sutherland* (8) was wrongly decided. That is put, perhaps, rather more clearly by VISCOUNT DUNEDIN, at p. 235, in *Inland Revenue Commissioners v. Miller* (4). He says :

I am therefore of opinion that the distinction taken between what might be let and what might not be let is not a relevant distinction, and the Free Church manse case [that is, *M'Dougall's* case (8)], which was distinguished from the Established Church manse case on that ground, was wrongly decided.

C The same view was expressed more fully by LORD WARRINGTON, at p. 239 :

the decision being determined by the view that, inasmuch as in the opinion of the court the minister could not let the manse, or otherwise turn the annual value thereof into money, such annual value was not part of his income. In my opinion, this case was incorrectly decided.

D That case, therefore, has been over-ruled, although, apparently, because the ground on which the court based their decision was erroneous, and involved misapprehension of the true effect of the decision in *Tennant v. Smith* (2). It appears to me, looking at the statement of facts in *M'Dougall v. Sutherland* (8) at p. 262, that in truth the case ought to have been
E decided simply on the ground that, during the incumbency of a particular minister, the manse was to be for his use for the time being, that is to say, either for life or so long as " he shall remain minister thereof." Therefore, on that footing the case would come within the principles of *Inland Revenue Commissioners v. Miller* (4), the manse being vested
F in trustees, as appears from the statement, subject to that particular trust in favour of the minister, and thereby the minister would, during the appropriate period, be in beneficial possession of the manse in his own right.

The later case of *Corke v. Fry* (9) is also based upon the same mis-
G reading of the decision in *Tennant v. Smith* (2). In that case it was held that the incumbent was assessable, and it was said in *Inland Revenue Commissioners v. Miller* (4) to have been correctly decided, but for the wrong reason. I need not repeat what that reason was. It was the same reason as was adopted in *M'Dougall's* case (8). It appears from
H the facts stated that the incumbent, who was an incumbent of the Established Church in Scotland, was in truth the owner and proprietor of the premises, and there was no ground there for applying to his case, as far as I follow the facts, the principles which I have already extracted from the cases to which I referred at an earlier stage of this judgment.

There is no ground for saying there that the occupation was merely for the purposes of the Church, or was a compulsory term of his incumbency. I agree, therefore, with the conclusion and the reasoning of the learned judge, and I think the appeal ought to be dismissed with costs.

ROMER, L.J.: The appellant in this case is a minister of the Methodist Church, and was in due course appointed to be minister of the Methodist circuit of Redhill, the appointment to that post being made by the Annual Methodist Conference, in whom is vested the general control of the Methodist churches. The circuit itself is controlled by a committee, called the quarterly meeting, and the circuit, acting through the quarterly meeting, has to provide the minister's stipend, and it buys, takes on lease, or otherwise provides a manse, in which the minister appointed to the circuit is required to reside, and from which he carries on his work which consists of preaching, pastoral work, and administration. I would like to point out that it would seem probable that part, at any rate, of the work of administration would be carried on in the manse, rather than in any one of the churches which are in the circuit. However that may be—I am reading from the case—his appointment involved that he should go and reside at Westerley, which was the manse provided by the circuit for the minister of the Redhill circuit. It further appears from the case that it is a strict requirement that a minister appointed to a circuit should live in the house provided by the circuit, whether it is suitable for him or not, in order that he may perform his duties. In these circumstances I am of opinion that the principle to be applied to this case is the principle applicable to the case of master and servant. That principle has been enunciated in several cases, but probably in no case more clearly than by TINDAL, C.J., in the case to which my Lord has referred: *Hughes v. Chatham Overseers, Burton's Case* (6). In his judgment in that case, TINDAL, C.J., said this at p. 78: F

A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he do so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be, that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master.

It is true that these observations were made in the case in which the court had to consider whether the servant occupied as a tenant within the meaning of a rating statute of 2 Will. IV, c. 45. In my opinion, the same principle is applicable to a case where the question is whether the servant is an occupier within the meaning of the rules to Sched. A. In my opinion, on the facts to which I have referred, the appellant in this case occupies the manse, not by way of payment for his services, but for the purpose of performing them. He is not permitted to occupy,

- as a reward in the performance of his master's contract to pay him, but is required to occupy, in the performance of his contract to serve his master. It has been contended before us that that principle is applicable only where the servant occupies a part of a tenement belonging to his master. No such qualification is to be found in the rule stated by TINDAL, C.J., and I know of no authority for the introduction of any such qualification into the principle. I agree, however, that, for the purpose of deciding on which side of the line which was drawn by TINDAL, C.J., a particular case falls, the fact that the servant is occupying the whole rather than part of his master's tenement is a relevant circumstance, which should be taken into consideration. In my opinion, the appellant in this case is not the occupier of the manse, within the meaning of the rules to Sched. A. Whether that occupier be the Methodist Church, or the annual conference, or the circuit, or the trustees, in whom I understand the manse is vested in law, it is not necessary to consider—one or other of those bodies is the occupier. The appellant, in my opinion, clearly is not.

- I will add only this, that, in the case to which we were referred, and which my Lord has already mentioned, *M'Dougall v. Sutherland* (8), the manse which was in question there was vested in trustees who held it upon trust:

for behoof of the Free Church congregation of Rothesay, and it is thereby declared that the manse is to be "for the use of the minister for the time being, of the said congregation, during his life and so long, but so long only, as he shall remain minister thereof . . ."

- The minister therefore occupies the manse not as a term of his employment at all, but because, the moment he was appointed to the particular living, he *ipso facto* became a *cestui que trust* under the trust document. The case, therefore, is very similar to the case of *Inland Revenue Commissioners v. Miller* (4), to which my Lord has referred. The other case to which we were referred relating to the occupation by the minister of a manse was that of *Corke v. Fry* (9). In that case, on the facts being examined, it will be found that the manse was a freehold, if that be the proper word to apply to a Scottish hereditament, of the minister himself. If he was not in occupation, nobody else was. In that case, he being the owner of the freehold, the freehold was vested in him, not as one of the terms of his appointment, but vested in him *ipso facto* as part of his appointment to the benefice. That being so, it would be a case in which it was impossible to hold that he was not the occupier, although, in point of fact, it was held that he was not the occupier, because, as my Lord has pointed out, the learned judges who decided that case were under the impression that the determining factor in that case and all such cases was whether the occupation could or could not be turned to profitable account by the alleged occupier.

For these reasons, in addition to those given by LORD WRIGHT, M.R.,

which are really in substance those given in the court below by LAWRENCE, J., I agree that this appeal fails, and must be dismissed.

GREENE, L.J. : I agree. The crucial matters of fact in this case are contained in those paragraphs in the stated case which have been already read, where the nature of the respondent's use of this house, and the reasons why he is compelled to use it, are set forth. Those paragraphs, to my mind, make it quite clear that the house is not provided merely as a convenience for the minister, where he can live or not, as he pleases. Its use is not necessary for him in the sense merely that it is necessary for everyone to live somewhere. He is required to live there because it is necessary for him to do so for the proper performance of his duties. He is put into the house by the authorities of the Church, and I can see no distinction between this case and the case where a chauffeur or gardener is put into a house or a cottage in order that he may perform the duties which fall to be performed by him. The house, I think, may not inaptly be compared to an implement of trade provided by the employer and put in the employee's hands, which he is under an obligation to use.

Now, it was said on behalf of the Crown that the principle is not applicable unless it can be said that the house is in some sense part of some larger hereditament, which is in the occupation of the employer. I am quite unable to see on what logical ground any such distinction can be based. The true fact of the matter, I think, is this : Work may be of such a character that residence in a particular place may be essential for its performance. In the case of manual workers and the like, the character of the work which they have to perform will, in general, be work which requires their presence on the master's premises. To take the case of a caretaker, or a policeman who is employed round and about a police station, or to take a case which is not a case of a manual worker, but in this respect very much resembles it, that of a bank manager, in all those cases the character of the work to be performed necessarily involves the presence of the person employed in a particular limited area or curtilage. But, when you are dealing with work such as that which has to be performed by a minister of the Wesleyan Church, work which involves the service of a number of scattered churches in addition to the work of administration and pastoral work, obviously the considerations of the place where he is to live are of the very greatest importance, and cannot be limited or tied down, as they would be in the case of a manual labourer. The very character of the work itself makes it impossible to locate the minister in one place such as a particular church. For instance, if he has six churches to serve, quite clearly to locate him in a manse forming part of the same building as one of them would not achieve the object desired. Therefore, when the

character of the minister's work is considered, it seems to me that it brings out very clearly the illogical nature of the distinction which the Crown attempted to draw.

- I wish to add only one word. Great stress was laid on *Inland Revenue Commissioners v. Miller* (4) and cases of that description, where, under a trust, a beneficiary is permitted to use or to live in a residence. I do not propose to occupy time by giving my reasons for thinking that these cases do not touch the point, because it seems to me that the distinction between them and the present case is too obvious to need explanation.
- B** *Appeal dismissed with costs.*

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Butt & Bowyer* (for the respondent).

[Reported by DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re LEWIS'S WILL TRUSTS, PHILLIPS *v.* BOWKETT.

[CHANCERY DIVISION (Clauson, J.), January 21, 1937.]

Will—Construction—Legacy to “children of E. J. and M. J.”—Whether child of E. J. alone included.

After the testator's birth, his mother, M. J., married E. J., a widower with one daughter. There were three children of the marriage of M. J. and E. J. By his will, the testator gave to his trustees £10,000 “upon trust to invest the same and to pay the income thereof to E. J. and my mother M. J. . . . during their joint lives, and on the death of either of the said E. J. and M. J. upon trust . . . to divide the same in equal shares between the children of the said E. J. and M. J. on their respectively attaining the age of 21 years” :—

HELD : upon the true construction of the will, the legacy became, on the death of the survivor of E. J. and M. J., divisible in equal thirds between the three children of the marriage of E. J. and M. J. and the child of E. J. by his former marriage was not entitled to share in the legacy.

[EDITORIAL NOTE.] This is the first time this particular point of construction has arisen. The case may, however, be usefully compared with *Re Baynham, Hart v. Mackenzie* (1891), 7 T.L.R. 587; 44 Digest 843, 6957, where a somewhat similar line of reasoning was followed.

AS TO CHILDREN OF SUBSEQUENT OR FORMER MARRIAGES, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 744-746, para. 1374; and FOR CASES, see DIGEST, Vol. 44, pp. 841-843, Nos. 6948-6957.]

ADJOURNED SUMMONS taken out by the present trustees of the will of Ebenezer Lewis, who died on June 24, 1924. The testator was the illegitimate son of Margaret Jones, who, on July 5, 1902, subsequent to the testator's birth, married Evan Jones. At that time Evan Jones was a widower with one daughter, who, as Elizabeth Jenkins, is the third defendant to the present summons, and there were born of his marriage with Margaret Jones three children, the second plaintiff and the first two defendants to the present summons. By his will dated Feb. 17, 1923, the testator bequeathed to the trustees therein named the sum of £10,000 :

upon trust to invest the same and to pay the income thereof to Evan Jones and my mother Margaret Jones of Church Terrace, Tylorstown, aforesaid during their joint lives and on the death of either of the said Evan Jones and Margaret Jones upon trust as to the said sum of £10,00 to divide the same in equal shares between the children of the said Evan Jones and Margaret Jones on their respectively attaining the age of 21 years.

Evan Jones died on June 11, 1934, and Margaret Jones died on May 1, 1936, leaving her surviving the three children of her marriage with Evan Jones, and the daughter of Evan Jones by his former marriage. In these circumstances, the question which arose to be determined in the present summons was :

whether, on the true construction of the will, the legacy of £10,000 became, on the death of the survivor of Evan Jones and Margaret Jones, divisible in equal fourths between the plaintiff John Ifor Jones and the defendants, as the only children of either of them the said Evan Jones and Margaret Jones, or in equal

thirds between the plaintiff John Ifor Jones and the defendants Rosina Bowkett and Evelyn Jones, as the only children of the marriage of the said Evan Jones and Margaret Jones.

It appeared from the evidence that, for some years, the testator had lived in the same street as Margaret and Evan Jones and their children, with whom the defendant Elizabeth Jenkins had also lived, and it was not disputed that the testator knew that his mother was married to Evan Jones, and that he knew of the existence of Elizabeth Jenkins and her relationship to Evan Jones.

A J. *Belsham*, for the plaintiffs, the present trustees of the testator's will, stated the facts.

C E. *Harman*, K.C., and *Phineas Quass* for the first two defendants, the daughters of Evan and Margaret Jones.

R. F. *Roxburgh*, K.C., and *Roger Turnbull* for the last defendant, the daughter of Evan Jones.

C *Harman*, K.C. : Here you have a man leaving a legacy to a person whom he describes as his mother, and to a person whom he describes as Evan Jones. He must have known Evan Jones to be his mother's husband. A gift of a life interest to two persons, with remainder to their children, means the children of both, unless they are incapable of marrying at all. There is no authority on this point, but see JARMAN ON WILLS, 7th Edn., Vol. 3, p. 1692.

CLAUSON, J. : The difficulty which occurs in that sentence does not occur here. This clause, as it stands, could not be construed as a gift to one of two individuals. It must be children.

E *Roxburgh*, K.C. : There is no rule of construction about this. It cannot be suggested that JARMAN'S opinion constitutes a rule. The question has never arisen in a reported case. It is a pure question of construction, and the important words in the clause are the concluding words, "on their attaining the age of 21 years." Those words, which have a different sense from the words "who shall respectively attain the age of 21 years," involve the definition of a class, and it is quite sufficient, in order to become a member of the class, to predicate that a person is a child of one or of the other. That may not conclude the matter, but, if the testator only meant children of the marriage, why did he not say so ?

CLAUSON, J. : Evan Jones and Margaret Jones were married in 1902. At the time of their marriage Evan Jones had a daughter by a previous marriage. There are now in existence the daughter of Evan Jones, by that previous marriage, and the children of the marriage of Evan Jones and Margaret Jones. The testator, who was in fact a son of Margaret Jones, made his will in 1923, and died in 1924. In his will, he made this provision. He gave his trustees a sum of £10,000 : upon trust to invest the same and pay the income thereof to Evan Jones and my

mother Margaret Jones of Church Terrace, Tylorstown, aforesaid during their joint lives, and on the death of either of the said Evan Jones and Margaret Jones upon trust as to the said sum of £10,000 (or the investments representing the same) to divide the same in equal shares between the children of the said Evan Jones and Margaret Jones on their respectively attaining the age of 21 years.

At the time when the will was made, the testator lived next door to his mother, and was unquestionably aware of the fact that his mother was the wife of Evan Jones. On the clear grammar of the sentence in the testator's will which I have just read, I am prepared to hold that the children of the said Evan Jones and Margaret Jones means the persons who are able to say: "Evan Jones and Margaret Jones were or are our parents," and that it would be an unnatural use of language to construe this sentence as meaning that there is to be included in the class of children to be benefited a person who can say that her parent is Evan Jones, but who cannot say that her parents are Evan Jones and Margaret Jones. For the reasons which I have endeavoured to explain, I will declare that, upon the true construction of the will, the legacy of £10,000 became, on the death of the survivor of Evan Jones and Margaret Jones, divisible in equal thirds between the plaintiff John Ifor Jones and the defendants Rosina Bowkett and Evelyn Jones, as the only children of the marriage of the said Evan Jones and Margaret Jones. Costs of all parties as between solicitor and client to come out of the fund.

Solicitors: *Stikeman & Co.*, agents for *Horatio Phillips & Co.*, Ferndale, Glamorgan (for the plaintiff and the first defendants); *Wrentmore & Son*, agents for *W. D. Thomas*, Porth (for the third defendant).

[Reported by C. M. YOUNG, Barrister-at-Law.]

ROCHDALE CORPORATION v. LANCASHIRE COUNTY COUNCIL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
January 29, 1937.]

Poor Law—Settlement—Status of irremovability—Mental patient—Married woman—Settlement of husband—Mental Treatment Act, 1930 (c. 23), s. 18 (1) (b).

A married woman, who was a poor person and who had during the periods Aug., 1928, to Aug., 1931, Nov., 1931, to July, 1935, and Mar., 1936, to the present time, been maintained in various mental hospitals in the county of Lancaster, was ordered to be removed to the county borough of Rochdale. It was common ground that under the law as it was before the Mental Treatment Act, 1930, the husband had not at the material time acquired a settlement in or status of irremovability from the county borough of Rochdale. It was, however, contended by the respondents that by virtue of sect. 18 (1) of that Act the periods during which the poor person was a rate-aided person had not to be omitted in calculating the period in which the husband would obtain a status of irremovability or acquire a settlement, and that the husband had therefore acquired a settlement in Rochdale and that the poor person ought properly to be removed to Rochdale:—

HELD: the effect of proviso (b) to the Mental Treatment Act, 1930, s. 18, was that, as hitherto, a person's settlement was to be determined by the law antecedent to that Act, and the periods during which the poor person had been a rate-aided patient were not to be included in the calculation of the period at the expiration of which the husband would become irremovable or acquire a settlement.

[EDITORIAL NOTE. Under the Poor Law Act, 1930, s. 93 (1), it is necessary in calculating the one year's residence to give a poor person a status of irremovability to omit periods in which he or his wife has received poor law aid. While it might be argued that the Mental Treatment Act, 1930, s. 18 (1), in its earlier part might alter this rule, it is here decided that the rule is not so altered by reason of the proviso (b) at the end of the subsection.

AS TO LIABILITY OF COUNTY OR COUNTY BOROUGH FOR EXPENSES OF PATIENT, see HALSBURY, Hailsham Edn., Vol. 21, p. 402, para. 694; and FOR CASES, see DIGEST, Vol. 33, p. 256, Nos. 1754-1760.]

APPEAL by way of case stated, under Quarter Sessions Act, 1849, s. 11, in respect of a decision of the justices for Lancashire ordering a poor person, a married woman, who was the wife of one Herbert Livesey Farrar, to be removed to the county borough of Rochdale.

The poor person was maintained in various mental hospitals in the county of Lancaster and was therein receiving relief as a rate-aided patient during the periods: Aug. 18, 1928, to Aug. 22, 1931; Nov. 25, 1931, to July 19, 1935; and Mar. 28, 1936, to the present time. It was common ground that under the law as it was before the Mental Treatment Act, 1930, the husband had not at the material time acquired a settlement in or a status of irremovability from the borough of Rochdale. It was, however, contended by the respondents that by virtue of the

Mental Treatment Act, 1930, s. 18 (1), the husband was not to be deemed to be in receipt of poor relief or deprived of any right or privilege or subjected to any disability by reason of the fact that his wife (the poor person) was being maintained under the provisions of the Lunacy Act, 1890, or the Mental Treatment Act, 1930, in any place as a rate-aided patient, and that therefore the above periods during which his wife was a rate-aided patient had not to be omitted in calculating the period in which the husband would obtain a status of irremovability or acquire a settlement. On the other hand, it was contended that proviso (b) of the Mental Treatment Act, 1930, s. 18 (1), necessitated the omission of such periods in the calculation and that the calculation was precisely the same as under the Poor Law Act, 1930.

Percy Lamb for the appellants.

Basil E. Nield for the respondents.

LORD HEWART, L.C.J. : The case arises in this way. On June 8, 1936, upon a complaint made by the county council of Lancashire, two of His Majesty's justices of the peace for Lancashire ordered a poor person to be removed to the county borough of Rochdale. Notice of appeal against that order was in due time given, and afterwards, by the consent of the parties, and by order, this case was stated between the appellants, who are the corporation of Rochdale, and the respondents the Lancashire County Council.

The question which is raised is the question whether it was right to make an order removing this poor person to the county borough of Rochdale. She was born in 1888, and since 1915 she has been and remains the wife of one Herbert Livesey Farrar. It is not necessary to reiterate the chronology of the case. It is common ground between the learned counsel on both sides that if the law had remained in all respects as it was before the Mental Treatment Act, 1930, it could not be true to say that the husband had, at the material time, acquired a settlement in, or a status of irremovability from, the borough of Rochdale. That is the effect of the various sections to which our attention has been directed—the Poor Law Act, 1930, ss. 18, 84, 85 (2). But it was urged on the part of the respondents, both here and below, that the effect of the Mental Treatment Act, 1930, s. 18, is to vary that conclusion, and the question which we have to decide is whether, so far as the question of the removal of this married woman is concerned, sect. 18 enables her removal. The Mental Treatment Act, 1930, s. 18 (1), provides that :

A person shall not be deemed to be in receipt of poor relief or be deprived of any right or privilege or be subjected to any disability by reason only that he or a member of his family is being maintained under the provisions of the principal Act or of this Act in any place as a rate-aided patient.

But that enactment is subject to a threefold proviso, and the middle part of that proviso is as follows :

Provided that nothing in this section shall affect . . . (b) any provisions of the Lunacy Acts, 1890 to 1922, or of the Poor Law Act, 1930, relating to the settlement or chargeability of a patient. . . .

- A In other words, when you are asking yourselves the question, where was Mrs. Farrar settled, that question is to be answered by reference to the antecedent law, and is not in any sense affected by the provisions of the Mental Treatment Act, 1930, s. 18. It is suggested, in the ingenious
- B argument which we have had from Mr. Nield, that sect. 18, properly construed, draws a distinction between the husband and the wife, but I cannot accept that argument. The question is the settlement or chargeability of a patient. The settlement or chargeability of the patient is to be determined now as it would have been determined before
- C the Mental Treatment Act, 1930, was passed ; in other words, the settlement followed the settlement of the husband, and if by reason of the fact that the husband was not settled in Rochdale the wife was not settled in Rochdale, that conclusion remains true notwithstanding the passing of the Mental Treatment Act, 1930. I think the contentions
- D made in the court below by the appellants were correct, and that the answer is that the poor person was not last settled in the county borough of Rochdale. It follows apparently, and it is common ground that it follows, that the poor person was last settled in the county, but that question is not expressly raised. The question, and the only question,
- E which is raised is whether or not the poor person was last settled in the county borough of Rochdale, and I think the answer to that question is : No, she was not.

SWIFT, J. : I agree.

GODDARD, J. : I agree.

- F *Appeal allowed with costs.*

Solicitors : *Sharpe, Pritchard & Co.*, agents for *H. Bann*, Town Clerk, Rochdale (for the appellants) ; *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, County Solicitor, Preston (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

WARMINGTONS *v.* McMURRAY.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Farwell, J.),
February 3, 1937.]

Solicitors—Retainer—Retainer to prosecute a succession of matters—Entire contract—Termination—Costs. A

The defendant had embarked upon a variety of investments and transactions which were likely to result in serious losses. She retained the plaintiffs generally to prosecute all such actions and proceedings as might be necessary to get her out of her difficulties. Having successfully prosecuted several matters the plaintiffs delivered a bill of costs. The defendant, while offering to meet all disbursements in arbitration proceedings which were then being prosecuted on her behalf, intimated that she could not pay anything further. The plaintiffs then discharged themselves from their retainer and delivered a second bill and brought this action upon both bills:—

HELD: this was not a case of a solicitor retained to prosecute an action and no question of entire contract arose. The retainer here was one to prosecute a variety of matters and in such a case it was not reasonable that a solicitor should engage himself for an indefinite time without payment. In this case the solicitor could upon reasonable notice cease to act and sue for his costs. C

Decision of GODDARD, J. ([1936] 2 All E.R. 745), affirmed.

[EDITORIAL NOTE. Even when a retainer is entire the fact that the solicitor ceases to act for the client before the final conclusion of the matter in which he was retained does not necessarily preclude him from recovering his costs for work done. He can recover, where he discharges himself, if his client refuses to supply the requisite funds for the prosecution of the action or if the client conducts himself improperly. Here, however, the decision is upon another ground, in that it is held that the retainer was a general one to get the client generally out of her difficulties. In such a case there is no question of the solicitor being bound to prosecute the matter to a conclusion before being able to recover his costs. He may upon reasonable notice decline to proceed further with the matter unless his costs are paid; in other words, he may discharge himself from his retainer and sue for all his costs. D

AS TO TERMINATION OF RETAINER, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 737-739, paras. 1218-1220; and FOR CASES, see DIGEST, Vol. 42, pp. 53-55, Nos. 440-463.] E

Cases referred to:

(1) *Re Hall & Barker* (1878), 9 Ch. D. 538; 42 Digest 51, 414.

(2) *Re Romer & Haslam*, [1893] 2 Q.B. 286; 42 Digest 51, 416. G

APPEAL from a judgment of GODDARD, J., dated Mar. 13, 1936, and reported in [1936] 2 All E.R. 745.

G. Arnold Hopper for the appellant.

G. R. Blanco White, K.C., and Theodore F. Turner, for the respondents. H

Arnold Hopper: The question is, did the solicitors discharge themselves reasonably or unreasonably. A solicitor cannot retire at any moment if an action or arbitration be pending. In a complicated matter, there must be some well-defined break before he can justifiably retire,

and claim for disbursements. [Counsel referred to *Re Hall & Barker* (1), and *Re Romer & Haslam* (2).]

Blanco White, K.C., was not called on.

- A SLESSER, L.J.: The question which has first to be determined, in this case, is, what was the contract? The learned judge has found what he thinks was the agreement between the solicitor and the client, as gathered from the evidence which he heard, from the correspondence, and from an examination of the solicitor's bill of costs. The client did not give evidence, and the judge's final view is expressed in his judgment:

- C The arbitration was in truth only one part of the work which the solicitor was employed to do. To employ a solicitor to conduct an action is one thing; to employ him generally to get you out of your difficulties, which may involve bringing several actions, originating summonses, bankruptcy proceedings, and taking all manner of proceedings, extending perhaps over years, is another. I think it would be altogether wrong to apply the doctrine of entire contract to such a state of things as the present, and to isolate this arbitration, so to speak, from everything else.

- Mr. Hopper has agreed at the bar that he cannot contest the learned judge's finding as to what was the relation between the solicitor and the client in this case, and, in those circumstances, we must proceed to deal with this case on the basis that that was that relation. Now, it is conceded that this lady had consulted Messrs. Warmingtons, as is stated in their letter of Sept. 25, 1935. In July, 1933, she was in a very difficult position, and wished to be extricated by Messrs. Warmingtons from difficulties. All the different actions which Messrs. Warmingtons took, and which were foolishly obstructed by the acts of the lady herself, arose out of incidents of their general employment. Among other matters in which they managed to help her was a dispute in connection with a certain Mr. Cohn, and we are told by the learned judge that they succeeded in getting for her judgment on an interlocutory application for £1,500, with 7 per cent. interest. The rest of the action was left to proceed to trial. Then bankruptcy proceedings were instituted against Mr. Cohn, and, when all was apparently in train that Mr. Cohn should pay what he owed, it appeared that Mr. Cohn persuaded the lady to sign an agreement putting an end to the litigation, and referring certain matters to arbitration, in which each party was to bear its own costs, including the costs in previous proceedings; so that the inception of the arbitration did not come either on the advice or through the retainer of Messrs. Warmingtons at all, but was started by the lady, behind their backs, when they had got a settlement for her, and judgment against Mr. Cohn. In the matter of this arbitration, it appears that the arbitrator ordered new points of claim and defence to be delivered, and there were considerable expenses. Up to that time, already acting for this lady, a bill had been incurred for a considerable

sum of money to Mar. 25, 1935, £617 11s. 3d., and a number of letters passed, in which Messrs. Warmingtons asked for the payment of that sum, and, after the arbitration started, they asked for payment of their disbursements in relation to the arbitration, but the lady kept making repeated delays, and did not pay, and, finally, they discharged themselves from their service under the retainer, and the learned judge has found in effect that the solicitors had so discharged themselves. A

On an action which is, first, as to the £617 11s. 3d., balance due up to Mar. 25, 1935, and, secondly, as to the bill of costs for £814 7s. 1d. delivered on Oct. 30, 1935, no question now arises as to liability under the earlier bill, except that that is to go to taxation. As regards the latter, Mr. Hopper contended in the court below, and repeats the argument here, that, in so far as the lady was prepared to meet the solicitors by paying the actual disbursements, they had no right to refuse to continue with the arbitration, and, consequently, have lost their right to claim such moneys as they say are due to them under their second bill of costs. B C

Now, as I said at the outset of my judgment, once it was agreed that this was a general employment to do whatever was necessary to extricate this lady from her difficulties, and was not a contract to bring an action which might proceed at once, or was to proceed by breaks, it becomes, to my mind, perfectly clear that the solicitors were fully entitled to discharge themselves, on the ground that they had not been paid, and did not wish to go on without being paid, and that, to my mind, is made clear beyond dispute by two passages which I will read in the case of *Re Hall & Barker* (1), in the judgment of JESSEL, M.R., at p. 544, where he says this, speaking first of all of the principle that a solicitor cannot bring his retainer to an end in a particular action when his disbursements have properly been paid, and goes on thus : D E

Why you should extend any such doctrine I am at a loss to see, nor do I intend myself to attempt to extend it. I cannot see any reason for assuming that a solicitor undertaking a business of this complicated nature, such as the administration whether of a dead man's estate or an insolvent man's estate which may give rise to a score of suits, and may occupy a score of years before it is finally wound up, should be held to do a single and entire thing and not be entitled to be paid any remuneration until that single and entire thing is done. I think it is reasonable that a solicitor should not be held to have entered into such a contract. F G

And at p. 545, in a passage referred to by GODDARD, J., he said this :

If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money ; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe, and ask you to pay one half the price. That is intelligible. In my opinion, in the case of a solicitor there is not an implied contract of that kind. It bears no fair relation to the doctrine of entire contract. It is a series of services which, though nominally in relation to one matter, is in reality in relation to a succession of matters, and it is not within the doctrine of entire contract, because it is not within the mischief of it. It is not reasonable that a solicitor should engage to act on for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself. H

Now, this case seems to me clear, because it is not even limited to the transaction of dealing with any particular estate, or any general matter at all ; it is an employment as general as it possibly could be ; it is an employment generally to get this lady out of her difficulties. This case
A begins and ends with an understanding of the nature of the contract which is entered into. Once it is conceded or found that the contract is one of complete generality, the whole principle for which Mr. Hopper contends here, that there was an agreement by the solicitor to act throughout the litigation, seems to me to fail, and none of the cases which
B have been cited establishes his contention. I entirely agree with the views of the learned judge, and, therefore, I say the appeal fails.

SCOTT, L.J. : I agree with the judgment which has been delivered, and with that of GODDARD, J. The appeal should be dismissed.

C

FARWELL, J. : I agree with the judgment which has been delivered. I wish to add only a very few words. It seems to me the matter is one of some general importance. The whole matter, as my Lord has said, depends upon what was the contract which was made between the
D solicitor and the client. If a solicitor is engaged by a client to conduct an action, then the contract is necessarily a contract to continue to act as solicitor until the proceedings come to an end, and, in those circumstances, the solicitor is not entitled to determine his own engagement to act until that time comes ; he is bound to act throughout that litigation, and he breaks his contract if he seeks to discharge himself before
E the contract is performed. But, where a solicitor agrees to act generally for a person, either to get her out of her difficulties or in a general way, it is unreasonable to imply a contract that the solicitor is to continue to act without payment throughout the life of the client. Therefore,
F it is essential, in a case such as that, that the contract should be subject to this, that either party is entitled, upon reasonable notice, to put an end to the contract, and that, in my judgment, is exactly this case. I entirely agree and adopt the judgment of GODDARD, J., and the judgment of SLESSER, L.J.

G

Appeal dismissed.

Solicitors : *Fosters* (for the appellant) ; *Warmingtons* (for the respondents).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

WALKER v. KENNS, LTD.

[COURT OF APPEAL (Slessor and Scott, L.J.J., and Farwell, J.),
January 25, 1937.]

Companies—Private company—Directors—Service agreement for term of years—Termination on vacation of office—Re-election opposed by governing director at first ordinary general meeting—No re-election—Vacation of office—Wrongful dismissal—Table A, art. 73. A

The plaintiffs entered into an agreement with the defendant company, a private company under the Companies Act, 1929, to act as managers, buyers and supervisors for a term of 5 years. The agreement provided that it should be *ipso facto* determined upon either of the plaintiffs at any time vacating his or her office as director, but neither of them should at any time during its continuance resign his or her directorship or disqualify himself or herself from holding such office. At the first ordinary general meeting of the company, when the plaintiffs would, under Table A, art. 73, which was incorporated in the company's articles, automatically vacate their offices as directors, but be eligible for re-election, the chairman, who was the governing director, proposed a resolution that another person be appointed director in place of one of the plaintiffs and that the remaining vacancy be left unfilled. This resolution was after adjournments passed. The defendant company then treated the agreement as terminated, and the plaintiffs brought this action for wrongful dismissal:— B C

HELD: (i) if the plaintiffs had been re-elected, or not being re-elected there had been no resolution to fill up the vacated office, there would have been no vacation of their offices. D

(ii) the provision in the agreement for its termination did not apply only to voluntary resignation, and the plaintiffs' offices as directors had by reason of the passing of the resolution been *ipso facto* determined under the first part of the clause. E

[EDITORIAL NOTE. This case carries the matters considered in *Spencer v. Kennedy*, [1926] Ch. 125; Digest Supp., and *Holt v. Catterall* (1931), 47 T.L.R. 332; Digest Supp., a stage further. Those cases dealt with the position arising from the articles and the proceedings at the annual general meeting of the company, and the present case considers the result of such proceedings upon a contract of service entered into between the company and directors. The clause in the contract in the present case is probably a little unusual in its terms, but as the clause is considered in its separate parts the case is of general interest. F

AS TO RETIREMENT AND RESIGNATION OF DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 340-343, paras. 560-564; and FOR CASES, see DIGEST, Vol. 9, pp. 524-526, Nos. 3448-3466.]

Cases referred to: G

(1) *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; 9 Digest 526, 3465.

(2) *Re London & Northern Bank, Mack's Claim*, [1900] W.N. 114; 9 Digest 526, 3467.

APPEAL from a decision of GREAVES-LORD, J., dated Mar. 31, 1936. The facts of the case are set out in the judgments. H

R. C. Vaughan for the appellants.

F. van den Berg, K.C., and *George Bankes* for the respondent company.

Vaughan: It is submitted that the term in the agreement "if they shall vacate the office" does not cover retirement by rotation. Persons

vacating an office must take a voluntary part, either an act or an omission. To put on the agreement any construction, other than that there must be some voluntary act or omission, would mean that the agreement, the duration of which could not be altered by the plaintiffs, A could at any time be ended by the chairman, who is a life director. That is an unreasonable interpretation, which the court should be slow to adopt.

SLESSER, L.J. : This appeal fails. It has been argued with great B assiduity by Mr. Vaughan, and certainly on the face of the case there did appear to be some ground for complaint on behalf of his clients. The plaintiffs, Harold Walker and Mrs. Sarah Ann Walker, his wife, who are experts in the conduct of fish businesses, entered into an agreement with, and became directors of, a company called Kenns, Ltd., in association C with another gentleman, Mr. Burton. That company, which was registered on Sept. 4, 1933, is a private company, and, like many private companies, some, but not all, of the clauses of Table A are made to apply to it. By the provisions of art. 15 of the company's articles the number of directors was to be not less than two or more than five, and the D directors were, unless and until otherwise determined by the company, to be Mr. Kenneth Burton and the plaintiffs. Mr. Kenneth Burton was to be entitled to hold office as director as long as he lived, and, in his case, cls. 73 to 77, dealing with the retirement of directors and their re-election, were not to apply. Then there were provisions as to his E remuneration, and provisions as to the plaintiffs' remuneration, which was to be at the rate of £50 per annum. It is not necessary to consider here the provisions as to the shareholdings of the different parties, but it does appear that the actual distribution of the shares was such that, treating the two plaintiffs as one party and Mr. Burton as the other, F their shareholding in the company would have been equal.

The plaintiffs' claim is for damages for wrongful dismissal from the defendant company's employment as managers, buyers, and supervisors of the defendant company's business, in breach of an agreement made on Sept. 8, 1933, after the formation of the company, between the G company and the plaintiffs. It is necessary to look at the terms of that agreement in order to see whether there has or has not been a breach as alleged. In my opinion, the language of the agreement is such that it is impossible to say that there has been a breach of its terms by the defendant company. By cl. 10 of the agreement, which is the one H which has principally here to be considered, it is provided that :

This agreement shall be *ipso facto* determined as to either of them Mr. Walker and Mrs. Walker who shall at any time vacate his or her office of director of the company but neither Mr. Walker nor Mrs. Walker shall at any time during the continuance of this agreement resign his or her office of director or disqualify himself or herself from holding office as a director by ceasing to hold the requisite qualification or by any other means.

The first ordinary general meeting of the company was held within the 15 months provided for by art. 39 of Table A, as applied to this case, on May 28, 1935. It was there reported as to the profits of the company, which apparently were considerable, and a resolution was passed as to the distribution of dividends. The minute goes on to say that the chairman that is, Mr. Burton :

then proceeded to the question of electing directors, Mr. and Mrs. Walker having vacated office by virtue of cl. 73 of Table A.

Cl. 73 of Table A, which is, for the purpose of the plaintiffs, though not for the purpose of Mr. Burton, to be treated as one of the articles of this company, says that, at the first ordinary general meeting of the company, the whole of the directors shall retire from office. So that it would appear that Mr. Burton was right in saying that cl. 73 had created the vacation of office by Mr. and Mrs. Walker ; but, under cl. 75 of Table A, the retiring director shall be eligible for re-election, and, in my opinion, when a director does retire under art. 73, and is immediately re-elected under art. 75, it is not right to say, where these things have been done at the same meeting, that there has been a hiatus, or any cessor, in the office of director. The minute continues that Mr. Burton said :

that if Mr. and Mrs. Walker offered themselves for re-election, he contemplated putting forward a new director in place of Mrs. Walker, and not filling the vacancy created by the retirement of Mr. Walker, and he gave his reasons for the projected change.

It will be remembered that, under the articles, two directors would be a minimum for the conduct of the business. An adjournment was then asked for, in order that the company's solicitor might be present. There was an adjournment until June 4, when it was proposed again that Mrs. Burton be appointed director in the place of Mrs. Walker, who had retired, and ultimately, on June 26, after another adjournment, Mrs. Burton was duly elected a director, and Mr. and Mrs. Walker ceased to be directors, according to the resolution. A good deal of argument, apparently, in the court below, was directed to the question whether these resolutions, as carried on June 26, 1935, were or were not valid resolutions, and it was argued that, in fact, Mr. and Mrs. Walker had not ceased to be directors within the meaning of the articles. So far as the appeal here is concerned, Mr. Vaughan has stated that he has satisfied himself that that argument is not maintainable, and we are not called upon to consider it, and I, for one, express no opinion upon it ; but I must treat the resolutions as valid, and assume, for the purpose of construing the service agreement with which we are here concerned, that Mr. and Mrs. Walker had ceased, at the times complained of, to be directors of the company. In those circumstances, I think it is not arguable that they have done anything else but vacated their office as directors of the company, and, therefore, under cl. 10, the agreement has

ipso facto determined, as from the date of their ceasing to be directors. But I wish to deal with the argument which Mr. Vaughan used for refusing to accept that construction. He points out, to begin with, that those words are followed by the qualification that :

A neither Mr. nor Mrs. Walker shall at any time during the continuance of this agreement resign his or her office of director or disqualify himself or herself from holding office as a director by ceasing to hold the requisite qualification—

and he argues that the provision as to the vacation of the office applies only where a director has voluntarily vacated his office. So far from the
B latter words of the clause supporting his argument, they seem to me very much against it. The particular vacation of office, or one of the particular vacations of office, which would be voluntary would be resignation, yet it is said in terms that Mr. and Mrs. Walker shall not voluntarily vacate their office by reason of resignation. That is put
C after the word “but” following the general provision as to vacation of office, qualifying it, I think, to this extent, that, whereas the agreement provides that the agreement shall end if they vacate their offices as directors, yet they are not to free themselves of their obligations under the agreement by voluntarily ceasing to be directors ; and I regard those
D words following the word “but,” dealing with resignation, as words protective of the company rather than as words protective of Mr. and Mrs. Walker, preventing them from ceasing to carry on their duties under the five years agreement by the simple expedient of vacating their office, which would be one of the ways by which they could escape
E from their obligations. There are other limitations with regard to the company’s rights to determine the agreement ; thus, under cl. 8 :

The company may at any time determine this agreement by notice in writing given to Mr. Walker and/or Mrs. Walker (a) if the company pass an effective resolution for winding up or be wound up, (b) if either Mr. Walker or Mrs. Walker shall be incapacitated by bodily or mental ill-health for a period of three consecutive calendar months from efficiently performing his or her duties under this agreement.
F

Otherwise it would appear that the agreement must subsist for five years. But I think that in the body of the agreement itself there are further reasons for thinking that this agreement contemplated that it was to operate only while these two persons were directors of the
G company. I refer in particular to cl. 7, where FARWELL, J., has drawn to my attention that they are, in consideration for the service of managing these fish-shops, apart from the holding of certain shares, to receive the £50 directors’ fees, as is provided in the articles. It will be remembered that, in the articles, whereas Mr. Burton was to receive £100, the other
H directors were to receive £50. The fact that the £50 directors’ fee is incorporated as part of the consideration and the fact that the £50 is provided in the articles, both point to the conclusion that this agreement was drawn on the basis that, subject to the qualifications and exceptions which I have mentioned, it should subsist only so long as these persons

remained directors of the company. Therefore I think that the provision in cl. 10, as to the vacation of the office *ipso facto* determining the agreement, is not only in its natural language wide enough to cover this case, but is consistent with, and almost follows of necessity from, the rest of the agreement, which contemplates their remuneration being A upon the basis, and upon the basis only, that they should be directors. For these reasons, in my opinion, this appeal must fail, and be dismissed with costs.

SCOTT, L.J. : I agree, though, from the point of view of the merits B of the dispute, I confess—perhaps improperly—to regret that I cannot help the appellants. In this agreement it seems to me that the contemplation of the parties, looking at it as a business arrangement, was that the two Walkers were, as long as they behaved themselves, to remain directors of the company for the period of the five years. On the other C hand, I find it impossible to construe cl. 10 of the agreement in a way which will enable them to get any relief, by reason of the fact that they were not re-elected at the first ordinary general meeting of the company, where, under art. 73 of Table A, they necessarily automatically resigned. In those circumstances, I am obliged to agree with the interpretation of D the agreement put upon it by SLESSER, L.J., and my reluctance is, of course, not a legal view of the agreement at all ; I merely express it because it seems to me that the real complaint of the appellants here is not that they have not received everything they were entitled to under the agreement, as it was drawn, but that the agreement was not drawn E so as to give effect to what, I cannot help thinking, was probably the intention of both sides, namely, that the plaintiffs should be re-elected as directors as long as they carried out their duties under the agreement in accordance with its provisions. That is an obligation which could have been properly put upon Mr. Burton, as the holder of the half of F the shares of the company, though, of course, it is not an obligation which could have been put upon the company itself. I have nothing further to add.

FARWELL, J. : I agree. I want only to add two words with regard G to art. 73 of Table A. At the first ordinary general meeting of the company, by virtue of art. 73, Mr. and Mrs. Walker were bound to retire. Had they, at that meeting, been re-elected, or, not being re-elected, had there been no resolution to fill up the vacated office, they would have remained directors, and there would have been no vacation H of the office at all. If, on the other hand, the office is filled up by someone, or there is a resolution not to fill it up at all, then either Mr. or Mrs. Walker, as the case may be, or both, is or are bound to vacate office. Such vacation of office is brought about by the result of the

articles ; but, none the less, as soon as that event happens, those two persons do vacate their respective offices as directors, and thereupon, in my judgment, it is impossible to escape from the plain meaning of the first part of cl. 10 of the agreement, which provides that, in that event,

A the agreement is determined.

Appeal dismissed, with costs.

Solicitors : *Attenboroughs* (for the appellants) ; *Beachcroft, Wakeford May & Co.* (for the respondent company).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

B

Re HALL'S SETTLEMENT TRUSTS, SAMUELL v. LAMONT.

C [CHANCERY DIVISION (Clauson, J.), **January 28, 1937.**]

Settlement—Trust to pay legacies mentioned in will—Death of legatees before death of settlor—Rights of legatees.

By a will dated Sept. 24, 1904, a testator gave *inter alia* legacies to two persons, who died before the testator. On Nov. 14, 1904, the testator executed a settlement, whereby he settled a certain fund upon himself for life and provided that after his death the fund should be held in trust to pay his debts and testamentary expenses "and the legacies bequeathed under the said will dated Sept. 24, 1904," in so far as his other estate should be insufficient, with certain trusts of the residue. It was determined by the court in 1919 that the trusts of the settlement were absolute and irrevocable whether the will was revoked or not. The will was revoked in 1934, and the testator died in 1936. A summons was taken out to determine the rights of the personal representatives of the two legatees above-mentioned :—

HELD : the trust in the settlement was for the payment of legacies, which involved the proposition that the donees were respectively living at the death of the testator. The personal representatives of the two legatees, who died before the testator, were, therefore, not entitled to payment of the legacies.

F

[EDITORIAL NOTE.] The non-payment of the legacies in this case would have been beyond question if the will had stood alone. There was, however, a trust for their payment in a settlement, the trusts of which had been held by the court to be irrevocable, whether the will was revoked or not. The decision, however, is that, as it is of the very nature of legacies to fail if the legatee predeceases the testator, an irrevocable trust to pay a "legacy" will fail if the legatee predeceases the testator.

G

AS TO LAPSE OF LEGACIES, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 607, 608, paras. 1190, 1191 ; and FOR CASES, see DIGEST, Vol. 44, pp. 492-494, Nos. 3111-3139.]

H Case referred to :

(1) *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325 ; 40 Digest 517, 617.

ADJOURNED SUMMONS to determine the rights of certain persons named as beneficiaries in a will of John Henry Hall, which was dated Sept. 24, 1904. Under that will, which the testator subsequently revoked

on July 12, 1934, James Lamont was given a legacy of £300, Francis William Lawrence was given a legacy of £500, and Elizabeth Lindsey an annuity of £50. James Lamont died on Jan. 27, 1933, intestate, and letters of administration were granted to his widow, Susan Lamont, the first defendant to the present summons. Francis William Lawrence A died on Oct. 12, 1933, having by his will appointed his widow, Margaretta Lawrence, the second defendant to the summons, his sole executrix. The testator died on Mar. 2, 1936. At the date of the summons, it was not known whether Elizabeth Lindsey had survived the testator or not. Lamont and Lawrence having thus died before the testator, any claim B they would have had, under the will, to their respective legacies, even if the said will had not been revoked, would have failed by reason of the doctrine of lapse. But, on Nov. 14, 1904, the testator had executed a settlement, whereby he created a trust fund of £5,000, which he settled on himself for life, and then provided as follows : C

3. And after the decease of the said John Henry Hall in trust to pay and discharge out of the said trust fund all debts and testamentary expenses and the legacies bequeathed under the said will of the said John Henry Hall dated Sept. 24, 1904, in so far as any other the estate and property of the said John Henry Hall at the time of his death shall be insufficient.

4. And as to the residue of the said trust fund after payment of the said debts testamentary expenses and legacies if necessary as aforesaid upon the trusts and subject to the powers and provisions by and in the said will of John Henry Hall dated Sept. 24, 1904, contained and declared. D

In 1919, on an application by originating summons, by the then trustee of the settlement, for a declaration as to the rights of the trustee of a deed of assignment, entered into by the testator for the benefit of his E creditors, in the funds subject to the settlement, SARGANT, J., declared that the trusts of the settlement were absolute and irrevocable, whether the will was revoked or not. In these circumstances, it was contended on behalf of the personal representatives of Lamont and Lawrence that they were beneficiaries under the settlement, in addition to having been F legatees under the will, and that, as such beneficiaries, they were entitled to vested interests in the sums so bequeathed to them, which could not be affected by the doctrine of lapse.

M. J. L. Beebee, for the plaintiffs, the present trustees of the settlement, stated the facts. G

L. W. Byrne, for the first two defendants : The sums of money mentioned in the settlement are not legacies at all. No part of the will of 1904 was admitted to probate. The order of SARGANT, J., is in the widest terms, and he is treating the settlement as if the clauses of the will were read into it. In the face of that, it must be said that these H legacies have lost their character of legacies, and remain as beneficial trusts under the settlement : see the *dictum* of FARWELL, L.J., in *Re Beaumont, Bradshaw v. Packer* (1), at p. 328, as to referential trusts.

H. E. Salt for the third defendant, the sole residuary legatee under

the will of Ellen Lavey, who was absolutely entitled to the residue of the trust fund under the settlement: The order of SARGANT, J., while declaring that certain referential trusts were absolute and irrevocable, did not declare that they were not in their nature contingent, and I say that the trusts in the settlement in favour of Lamont and Lawrence have failed by reason of the nonfulfilment of the contingency of these beneficiaries surviving the settlor. If the words of the will are read literally into the settlement, the trust is that, if there should be a deficiency, the settled fund is to be used to pay certain legacies bequeathed by the will, and the word legacy must carry with it its legal incidents, one of which is its liability to lapse. Both these legatees died before the will of 1904 was revoked, and it would be an absurd result if the revocation of the will should have the effect of giving legatees under it a benefit, which they would not otherwise have had, by reason of the doctrine of lapse. If cls. 3 and 4 of the settlement are read together, it will be seen that the settlor declares that the fund shall be resorted to only in so far as any other his estate or property is insufficient, and there is no need to resort to the fund if certain legacies, bearing all the characteristics of legacies, do not fall to be paid at all, by virtue of their having lapsed.

CLAUSON, J.: In this case, John Henry Hall, whom I will, for convenience, call the settlor, on Nov. 14, 1904, executed a settlement of a sum of £5,000. He directs the trustees to invest the sum and to pay the income during his life to himself, and after the decease of the said John Henry Hall in trust to pay and discharge out of the trust fund all debts and testamentary expenses and legacies bequeathed under the said will of John Henry Hall, dated Sept. 24, 1904, in so far as any other his estate or property at the time of his death should be insufficient. As to the residue of the said trust fund, after payment of the said debts and testamentary expenses and legacies, if necessary, as aforesaid, upon the trusts and subject to the powers and provisions by and in the said will of the said John Henry Hall, dated Sept. 24, 1904, contained and declared of and in respect of the residuary estate of the said John Henry Hall therein mentioned. It is a little odd that that will which is mentioned is referred to as "the said will." One would have expected to find some recital about it. But it is quite plain that this document refers to a will of the date there mentioned, that is, Sept. 24, 1904. What happened subsequently was that the testator revoked this will, and, I suppose, made some other testamentary disposition. I do not know about that. But, in the year 1914, the settlor executed a deed of assignment for the benefit of his creditors, and the matter of this settlement was brought before this court on an originating summons. The trustee of the deed of assignment apparently suggested that in some shape or

form he had a claim to the corpus of the settled fund, for satisfaction of the settlor's debts. I am told that in fact the settlor's debts were paid out of the income of the fund. Of course, the life interest of the settlor would become vested in his trustee, and become liable for his debts. But, the matter having come before the court, an order was made by SARGANT, J., in the following terms :

This court doth declare that the trusts declared by the indenture of settlement dated Nov. 14, 1904, to take effect after the death of the defendant John Henry Hall are absolute and irrevocable whether the will of the said John Henry Hall in the said settlement mentioned is revoked or remains until his death and accordingly that the defendant John Stuart Cowans is not entitled during the life of the said John Henry Hall to have any sum raised out of the funds subject to the said settlement for payment of the debts of the said John Henry Hall.

Now I turn to this will, this revoked will, which, of course, being revoked, has never been admitted to probate. There is no dispute, however, what document it was which the testator executed as his will, and subsequently revoked. The terms of that document provided this. They provided for the gift to John Lamont of £300, and to Francis William Lawrence of £500, and to Elizabeth Lindsey, during her life, an annuity of £50, free from death duties, "commencing from my death." Then there is a provision for protecting the annuity from creditors, and so on, after which the document goes on to provide in this way :

I devise and bequeath all the rest and residue of my said real and personal estate whatsoever and wheresoever not hereby otherwise disposed of unto my trustees upon trust that my trustees shall sell call in and convert into money and shall with and out of the moneys produced by such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will and the legacy duty on the latter and as to the residue thereof upon trust to divide the same equally between my said two sisters Frances Chambers Hall and Jessie Margaret Weblyn and in case either of them shall die in my lifetime I bequeath the one moiety of the said residue herein before given to her so dying upon trust for the survivor of them and in case both of them shall die in my lifetime I bequeath the said residue upon trust for the child or children of the said Jessie Margaret Weblyn living at my death who being a son shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry under that age.

I ought to mention that both Frances and Jessie died in the lifetime of the settlor. Jessie, however, had two children, who are still surviving, and by various assignments the last defendant is now entitled to the interest under the settlement of the children of Jessie Margaret Weblyn.

Turning again to the settlement, and reading it in the light of the order of SARGANT, J., one thing is quite plain, namely, that, under cl. 4 of the settlement, Jessie's children, having survived the testator, take what I may call, for this purpose, the ultimate interest in the settled fund. The question which was propounded for my consideration was this. Can a claim be set up for payment out of the fund of the £300 legacy to Mr. Lamont, and of the £500 legacy to Mr. Lawrence and of the £50 annuity to Mrs. Lindsey ? Both Mr. Lamont and Mr. Lawrence

died in the testator's lifetime. With that fact in mind, let me turn back to the revoked will, the terms of which, in view of the judgment of SARGANT, J., I have to read into cl. 4 of the settlement. What are the trusts which are then applicable to the fund, in the event which has happened of the testator being dead, and of Mr. Lamont and Mr. Lawrence having died in his lifetime? The trust seems to me to be to pay these gifts to Lamont and Lawrence as legacies, which involves the proposition that the donee must be living at the death of the testator. That being so, I can find nothing in the terms of the settlement which provides for any payment to the estate of Lamont or to the estate of Lawrence. The trust provides for a payment to Lamont and a payment to Lawrence if, at the death of the testator, they are there to get it. It provides nothing more than that. Accordingly, in my view, I must answer the question put to me in the summons by declaring that, in the events which have happened, Mrs. Lamont, as the personal representative of Lamont, and Mrs. Lawrence, as the personal representative of Lawrence, are not entitled to payment out of the trust fund of the sums of £300 and £500 respectively.

I have mentioned the annuitant, but it is not known whether the annuitant is living or dead. Of course, if she in fact survived the testator, there is nothing, in my judgment, which will prevent her being entitled to have her annuity provided for out of the trust fund. There are, however, certain other difficulties on the construction of the settlement, in view of the judgment of SARGANT, J., which difficulties have to some extent been discussed during the hearing of this summons, but as to which it is not for me to foreshadow the view I take, as the difficulties which might arise do not in fact arise in anything I have to decide. I desire, however, to help the parties with regard to the annuitant, and I propose to direct an inquiry whether the annuitant survived the settlor, and, if she did, whether she is now living or dead, and, if dead, when she died, and who is her personal representative, the summons to be amended to ask for this inquiry. There will be a stay of further proceedings against the first two defendants, and the costs of all parties up to date, as between solicitor and client, will come out of the trust fund.

Solicitors: *Windybank, Samuell & Lawrence* (for all the parties).

[Reported by C. M. YOUNG, Barrister-at-Law.]

HUNT v. RICE & SON, LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), January 26, 1937.]

Master and Servant—Liability of master—Accident to servant—"Works"—Employers' Liability Act, 1880 (c. 42), s. 1 (1).

A
A builder's labourer was engaged digging a trench 6 ft. deep in connection with the erection of a block of flats. The side of the trench was not secured by boards. Owing to the unsuspected existence of an old drain near one side of the trench, that side fell in and the labourer was fatally injured. In an action founded, *inter alia*, upon the Employers' Liability Act, 1880 :—

B
HELD : (i) the trench was not a part of the "ways," but it was a part of the "works" of the defendant company within the Employers' Liability Act, 1880, s. 1 (1).

(ii) there was no negligence in failing to board the trench nor in failing to discover the old drain.

C
[EDITORIAL NOTE. The term "works" in the Employers' Liability Act, 1880, s. 1, has been extended to the premises in possession of a builder for building operations. It appears clear that the word must be extended to all parts of the site and all operations in connection with the building or demolition in hand. The consideration of the duty of the builder or contractor as to ascertaining the existence of old drains and other earlier works that may be a source of danger to men engaged in the operations in hand is of some importance to persons undertaking such work.

D
AS TO "WAYS" AND "WORKS," see HALSBURY, Hailsham Edn., Vol. 22, pp. 200, 201, paras. 340-342; and FOR CASES, see DIGEST, Vol. 34, pp. 223-225, Nos. 1865-1883.

E
ACTION for damages for negligence causing death. The claim was made under the Fatal Accidents Act, and, in the alternative, under the Employers' Liability Act, 1880. The case is reported only so far as the alternative claim under the Employers' Liability Act is concerned. The facts, which are fully stated in the judgment, are shortly these. A workman employed upon the building of five blocks of flats was engaged in the excavation of a trench 6 ft. deep. It is unlikely that any accident would have happened but for the existence, which was not suspected by anyone, near one side of the trench of an old drain. That side of the trench fell in and the workman was fatally injured.

F
N. L. C. Macaskie, K.C., and Martin O'Connor for the plaintiff.

G
Gilbert Paull for the defendant company.

H
MACKINNON, J. : In this case, the plaintiff is the widow of Sidney Hunt. He was involved in an unfortunate accident on Jan. 23, 1935, and, as the result of that, he died five days later. The facts out of which this litigation arises are these. The plaintiff was a builder's labourer, employed by the defendant company for the work of a builder's labourer, among other things, that of digging trenches. The work that they were engaged upon, where the accident happened, was the building of 5 blocks of flats somewhere in Streatham. The general foreman

in charge of the work on behalf of the defendant company was a Mr. Simmons, and the navvy-ganger, or foreman, of the little gang, of which the deceased was a member, was one Osborne. Alongside the front of one of these blocks of flats, and parallel to it, according to the
A plans of the architect, there was a drain, which had to be dug and laid. There were five manholes connected with drains into the interiors of the flats, and with a connecting drain running along and joining up all the manholes. The particular work that the deceased, under the charge of Osborne, was engaged in was the construction of one of the trenches
B for the drain, connecting two of the manholes. The manholes were 8 ft. to 9 ft. square, and the trench between them was 15 ft. to 20 ft. long, 2 ft. or 3 ft. wide, and 6 ft. deep. The surface of the ground below which these manholes and the trench had to be constructed was, in fact, the floor of an old building which existed there, and, when you stood
C on the surface, before any digging operations took place, there was a flagstone or tile surface, beneath which there was concrete. The line having been marked out, no doubt the tiles or the flagstone and the concrete beneath it were cut out, and so they got to the earth beneath. They then proceeded to dig out the manholes, and the trench between
D them. As the trench was dug out, one side of it was in fact provided by an old wall of a previous building, which extended down the whole side of the trench, and, I am satisfied, right down to the bottom of the concrete foundation beneath it. Therefore, that side of the trench was perfectly firm and solid. The other side of the trench was earth
E or soil, gravel—some substance in the nature of earth. The trench was dug out after the surface of the tiles and concrete had been removed all along, and the two manholes were also dug out. At the end of the trench near to one of the manholes, and across what would have been the trench, or ought to have been the vacancy of the trench, there was
F another piece of ancient building, a red brick wall, and, in order that the vacancy of the trench could take the place of that brick wall, that had to be cut away for the width of the trench. That was done, after the rest of the trench had been dug out, by the operations of this little gang, by the use of a pneumatic drill. Then, according to Baker, who
G was called and gave evidence, they left the trench for a short time, in order to attend to some other work they were called upon to do in unloading some cement. They then came back to the trench, where very little remained to be done before the putting in of the concrete and the laying of the pipes, and the deceased, Baker, and the other man,
H were engaged in finally clearing out some of the rubbish from the bottom of the trench, when this unfortunate accident occurred. All of a sudden, without warning, part of the side of the trench, the upper portion of it, and a portion of what I may call the earth side, and not the wall side, caved in, and the earth, and something else besides earth, to which I

must refer shortly, fell upon the deceased, and knocked him down. He sustained, from the weight of the material which fell upon him, lamentable injuries. He was taken to hospital, and, as I have said, unhappily, five days afterwards, he died.

Now, the real complaint here is that the precaution of putting up timbering had not been adopted in this trench, when it had been dug out. In certain circumstances, and when it is necessary, it is an obvious precaution in digging a trench to have such timbering against the side of the trench, which I gather are called poles; then, transversely, there are waling boards, or wales, and then they are kept on either side pressed against the trench by cross bars across the trench, which I suppose are tightened up by wales, or by being of the exact lengths, and hammered down with certain outward pressure. It is obvious—after the event, it can be stated as a fact—that, if such timbering had been used in this trench, this earth would not have fallen, and the injury to the deceased would not have taken place. In this particular case, it would have been obviously quite unnecessary to have the poles on the wall side of the trench. The real negligence that is alleged in this case is the failure to provide for the trench, or, at any rate, this earth side of it, being protected in that way. The real question is whether it was negligence on the part of Osborne not to have had that timbering done. The question is whether Osborne did not take reasonable precautions, and whether this accident could have been avoided if Osborne had exercised reasonable care in the way in which he had the work carried out.

I think the reason why this collapse did take place was that, unknown to them, parallel to this trench, and under the old flagstones a little way away from the trench, there was an old drain, cased in cement. I think the real reason of this collapse of earth or material was probably that the heavier weight of that drain was influenced by some vibration, set up by the working of the pneumatic drill, along the end of the trench, and that the weight of that drain suddenly overcame the resistance of the earth outside it, and that earth, and, as I gather, part of the drain and the concrete, all came down into the trench. So far as I can gather, if it had not been for the unknown existence of that old drain, Osborne's judgment in thinking that this earth, in the nature of earth, did not need timbering would have been sound. It is only because, unknown to him, there was this feature in the earth that it is possible now to say it would have been prudent, and it would in fact have prevented this accident, if timbering had been used on the side of this trench.

Now, those being the facts, the question arises whether, upon those facts, the plaintiff establishes a liability on the part of the defendant company in this action. [His Lordship held that the claim under Lord Campbell's Act was defeated by the defence of common employment.]

There remains, however, a claim, the alternative claim, under the Employers' Liability Act, the object of which was, or, I imagine, one of the objects of which was, to cut down the immunity of the employer under that old doctrine of common employment. That Act provides :

- A (1) Where personal injury is caused to a workman (i) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or (ii) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence.

It is said a claim can be made in this case under those provisions. Some

- B suggestion was made, on behalf of the defendant company, that the section did not apply in this case at all, because you could not say that there were any ways, works, machinery, or plant used in the business of these employers. I think it is not a question of "ways" ; it is a question of "works," and Mr. Paull rather suggested that a half-built
C building would not be "works." I do not agree with that. I think the building site of a half-built house, where a builder is carrying on his operations, may be his works within the meaning of this clause. Was there any defect in the works ? There was not any defect, in one sense. There was not any defect in the site. There was, in particular, I think,
D no defect in the absence of appropriate material for doing the timbering, if Osborne had wanted to have had it done. I am satisfied that there was abundant timber available, and that, if Osborne had desired to have had this trench timbered, or if Baker or Hunt had suggested that they wanted it timbered, and got Osborne to let them do it, there was plenty
E of material with which it could be done, not, perhaps, lying alongside the trench, but in the stores of the building operations.

The real truth is that, if the plaintiff is to make a successful claim under this Act, it must be because of an allegation of negligence on the part of Osborne, failure to exercise reasonable care, in that he did not

- F have this trench timbered, and it comes back to the same question, whether there was negligence on the part of Osborne, whether this result ought to have been anticipated by him, by the exercise of reasonable care, and avoided by timbering. As I have said, it is easy, and it is obvious, after the event, to say that if this thing had been timbered
G the earth would not have fallen. The question I think I have to determine is : Was there, in the circumstances, to Osborne, as a reasonable man, exercising that practice which Mr. Featherstone has spoken to, an indication that he ought to have this timbered, and that it would be dangerous if he abstained from doing so ? Now, as to that, Osborne,
H as I have said, is dead, and there is no evidence except that of Simmons and Baker. They were the only ones who saw this trench while it was being dug and before the earth eventually fell in. I do not attach so much importance to Simmons' evidence, because he was general foreman, and he would not pay much attention to this question, a matter

which he would leave, and properly leave, to Osborne. He says he did not see any necessity for timbering in any sides of the trench ; but Baker, who was one of the men working in it, says that he never saw anything to indicate that it wanted any timber. He acquiesced, and worked himself there in the trench, and acquiesced in the absence of timber, and never suggested to Osborne that it was necessary. In those circumstances, I do not think it is made out that it was negligent on the part of Osborne to abstain from timbering this trench. I ought to say, with regard to that, that there was a suggestion made, on behalf of the plaintiff, that there was negligence on the part of somebody, because the existence of this old drain had not been discovered. He says that that ought to have been done by putting bore holes all over this site, in order to discover what drains there were. I cannot accept that. The drains might be anywhere, and, unless you had a bore hole every foot all over this surface, a chance bore hole anywhere about might very well miss it. In any case, I do not know for what reason it can be suggested there was any negligence on behalf of the defendant company or any of its servants in that bore holes had not revealed the existence of this drain.

The result is that I think this claim fails, and there must be judgment for the defendant company.

Judgment for the defendant company with costs. Stay of execution on the usual terms.

Solicitors : *Musson & Co.* (for the plaintiff) ; *Charles St. A. Butcher* (for the defendant company).

[*Reported by J. MACGILLIVRAY ASHER, Esq., Barrister-at-Law.*]

BEETHAM v. JAMES.

[KING'S BENCH DIVISION (Atkinson, J., with a common jury), **January 21, 22, 27, February 2, 1937.**]

Master and Servant—Seduction—Daughter—Father and mother not married — Effect on action by father—Master of the house.

In an action for damages for the seduction of the plaintiff's daughter, aged 22, it was admitted in cross-examination that the plaintiff and the girl's mother were not married. They had, however, lived together as man and wife for many years. The girl lived with the plaintiff and her mother, and, although she was out in employment during the day and contributed towards the household expenses, she assisted her mother with the household duties :—

HELD : the girl's services in the household were rendered to the plaintiff as the master of the house, and the fact that the plaintiff was not married to the girl's mother did not affect his rights in an action for seduction.

[EDITORIAL NOTE.] The action for seduction proceeds upon an assumption of loss of services. Generally speaking, it is brought by the father of the seduced girl,

but in *Peters v. Jones* (2) the girl was an adopted child and the action was successful. In the present case the girl was an illegitimate child of the plaintiff, who, however, had been living with the mother for over 20 years and they were reputed to be married people. The foundation is not the relationship of parent and child, but that of master and servant, and the services are not rendered to the plaintiff because he is the parent, but because he is the head of the house. The action therefore lay in the present case.

A AS TO PERSONS ENTITLED TO SUE FOR SEDUCTION, see HALSBURY, *Hailsham Edn.*, Vol. 22, p. 247, para. 429; and FOR CASES, see DIGEST, Vol. 34, pp. 174, 175, Nos. 1373-1392.]

B Cases referred to:

- (1) *Hamilton v. Long*, [1903] 2 I.R. 407, *affd.* [1905] 2 I.R. 552; 34 Digest 173, 1365 *xv*.
- (2) *Peters v. Jones*, [1914] 2 K.B. 781; 34 Digest 174, 1377.
- (3) *Watson v. Threlkeld* (1798), 2 Esp. 637; 27 Digest 212, 1837.

C ACTION for damages for the seduction of the plaintiff's daughter, Mabel, aged 22, and for certain expenses incurred in consequence of her illness. The case is reported only upon the question whether the fact that the plaintiff and Mabel's mother were not married, which was admitted in cross-examination, affected the plaintiff's right of action.

D *E. Holroyd Pearce* for the defendant: As it is now admitted that the father and mother are not married, any constructive services are owed, if at all, to the mother. The services which the plaintiff must show he lost must be *de facto* services. There has been no evidence that the plaintiff lost any services. The services of which there is evidence were given in

E assisting the mother with the management of the house. No specific evidence has been given as to who maintained the household. The court should be slow to draw any inference of fact of which there is no direct evidence in favour of a plaintiff who has endeavoured to mislead it. There is no presumption that the man is head of the household.

F The girl paid out of her wages £1 weekly to her mother. She was the mother's lodger and any slight services she gave were in addition. In law the plaintiff is only a putative father. The girl owes him no duty and in the absence of bastardy proceedings he has no legal liability for her. The plaintiff cannot be said to be *in loco parentis* because the mother is there, who is in fact the parent. To succeed the plaintiff must prove affirmatively that the services were rendered to him. [Counsel referred to *Hamilton v. Long* (1), *Peters v. Jones* (2).]

G *John Bassett* for the plaintiff: If this case were based on presumption of service it would be due to the mother, but the presumption may be
H rebutted. After the girl became 21 the service must be attributed to something else. After that they were rendered to the master of the household. The root of the question is, is the unmarried woman in a position different from that of a wife in the circumstances of this case? The plaintiff allowed her to use his name and cohabited with her for many

years. Father, mother, son and daughter all lived in the same house. [Counsel referred to *Watson v. Threlkeld* (3).]

ATKINSON, J.: The plaintiff claims damages for the seduction of his daughter. The case opened that the plaintiff had been happily married for 34 years and that he was entitled to very substantial damages for the dishonour inflicted on him and for the blow caused to his pride. The plaintiff went into the box and gave evidence of his happy married life; he said he had three children, the eldest a daughter who was a widow with a child, a married son with one child, and a daughter Mabel, aged 22 in July, 1935. The case was that Mabel had been seduced in Sept., 1935, and had had a miscarriage in Feb., 1936, causing her to be ill in bed for 6 weeks. The plaintiff was asked in cross-examination if he knew that Mabel had told the defendant that her parents were not married. He said that she could not have done that, and that, if she had, it was a lie, and in answer to a question he swore that he and his wife had been married in July, 1903, at a certain church in Weobley, Herefordshire. Mrs. Beetham was called and also swore that she and the plaintiff had been married 34 years ago at the church and place named, but when pressed as to the date she hesitated, and ultimately she admitted that she and the plaintiff never had been married. Mabel later said that it had been agreed between them that they should say they were married, to save her mother's honour. The admission that the plaintiff was not married to Mabel's mother raised the question whether this action could lie. It was agreed to go on on the assumption that it did, take the verdict of the jury, and argue the point afterwards. The jury found for the plaintiff for £50. The parties agreed that, if it became necessary that any further questions of fact should be decided, I should decide them.

The facts were that 20 years ago Mrs. Beetham, as I shall continue to call her, went with the three children to live in Llandaff, and that she brought them up there. The plaintiff's work took him all over the country and he went to them only in and for the holidays. Four years ago they came to London and took a house in Bedford Park. In 1935 the mother, son and Mabel were living there, and also the plaintiff, when he was not away on business, as he very frequently was. After the verdict I asked and was told that the plaintiff paid the rent of the house. There was no suggestion that Mrs. Beetham earned or had any money. Mabel has been employed at the C.A.V. works since the middle of 1934, and has paid her mother £1 a week towards the household expenses. I have no doubt that the son also paid something until his marriage in Oct., 1936. There was no evidence as to what the plaintiff paid, but there is no reason to suppose that he did not bear the main burden. Mabel was away at work shortly before 7.30 and was in

by 5.30. In the evening she helped to wash up and she helped her mother with the ironing and did her own room. These were the services on which the claim was based.

A If the plaintiff had been married to Mrs. Beetham there is no doubt that in law these services would have been deemed to have been rendered to him and that he and he only could have brought this action. It is argued for the defendant that, as the plaintiff is not married, it is impossible to hold that the services were rendered to him. Normally if the girl is under 21 a father need not prove actual service ; he can rest B his claim on a legal right to her services, but it is important to remember that that right rests on the legal position that a girl living with the parent is a servant. If the girl is over 21 the father must prove actual service. It is settled that, where actual services are rendered, whatever their character, however personal to the mother, they are rendered to C the father and not to the mother, and they are rendered to him in his capacity of the master of the house and home. Does it make any difference if the father is not married to the mother ?

The argument for the defendant is this. Before the girl was 21 the duty of service was to the mother alone. The unmarried father had no D right to her services. The service actually rendered while not of age must be deemed to have been rendered in discharge of that duty to the mother and it is impossible to presume that the attaining of the age of 21 changes the person to whom the services are rendered. I think the fallacy of that argument is the assumption that the duty when under E 21 is to the mother. In my opinion the duty of service is to the parent or person *in loco parentis* in whose household the girl is living, i.e., to the master of the house, the person who pays the rent and household expenses. When the girl becomes 21, there is no presumed relationship of master and servant. That relationship has to be proved by proof F of contract or actual service and the question then is one of fact : to whom were the services rendered ?

In *Hamilton v. Long* (1) the plaintiff was a widow, who brought an action for the seduction of her daughter. The seduction took place in the lifetime of the plaintiff's husband and the confinement after his G death. The question there was to whom were the services rendered before the husband's death. LORD O'BRIEN, L.C.J., said at p. 411 :

Now, at common law the action would not, in my opinion, be maintainable for this reason, namely, that to sustain an action of seduction it must be shown that the act of seduction took place while the relation of master and servant existed, and that relation in the father's lifetime existed exclusively between the father H of the family, and the daughter as his child, and one of the family and one of the household which he maintained. The wife may have been alive, and have directed the daughter in the discharge of her domestic duties, but these duties were rendered in respect of the house and family of which the father was the head : and, while the father was in that position, in the eye of the law the relation of master and servant was confined to him exclusively.

In *Peters v. Jones* (2) the girl was an adopted child of the plaintiff,

and no relation to the plaintiff's husband. Again, the question arose to whom were the services rendered, and again it was held to the husband, not because he was the girl's father, for he was not, but because he was head of the household. AVORY, J., said at p. 784 :

I think it is plain that the foundation of the action is not the relationship of parent and child but that of master and servant. A

And again at p. 787 :

The moment that one appreciates that the action is based on the relationship of master and servant and not on that of parent and child one sees that the only question for determination is, who was the girl's master at the material times ? B

If that is the test, there can be only one answer in this case. I hold that the plaintiff was no less the master than he would have been if he and the mother had been married. The plaintiff always held out the mother as his wife. Everything was the same as if they were married. He was assuming the duties of a husband, and the mere fact that he was not married cannot affect the case. I do not say that there might not be cases where that might be a material factor, as for instance, if a man were merely paying occasional visits to a mistress, and the question were in doubt whose was the establishment, but it does not affect the present case. C D

The question of costs has troubled me much more. The plaintiff has lied deliberately on a most material matter. His lie made a certainty of a result which in truth was open to argument. It also most materially affected the question of damages, since the main thing which the jury was entitled to consider was the blow to the parents' reputation and honour. Mr. Bassett has agreed that the plaintiff's conduct entitles me to depart from the general rule that where there is a verdict of a jury costs follow the event, and I think the proper order is that the plaintiff's costs should be reduced by £20. E

Judgment for plaintiff for £50 and costs less £20. F

Solicitors : *Schultess-Young & Co.* (for the plaintiff) ; *Bickerton Pratt* (for the defendant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

KING v. BULL.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Swift and Goddard, JJ.),
February 2, 3, 1937.]

- A *Telegraph—Wireless—Block of flats—Wireless receiving set installed by landlord—Loudspeaker in a tenant's flat—Liability of tenant for wireless licence—Wireless Telegraphy Act, 1904 (c. 24), s. 1 (3).*

The respondent was the tenant and occupier of a self-contained flat in a block of flats. The landlords installed in separate premises in the block two wireless receiving sets, each of which was fitted with an amplifier, which was connected by wires to a corresponding socket installed in each of the flats, including the respondent's. The respondent installed in his flat a loudspeaker, fitted with a wire and a plug, which plug he had from time to time inserted into one or other of the sockets, and had thereby received a broadcast programme. The operation and tuning of the two receiving sets were under the control of the landlords, their servants or agents. The respondent was charged with unlawfully working apparatus for wireless telegraphy without a licence contrary to the Wireless Telegraphy Act, 1904, s. 1 (3):—

- D **HELD:** as the particular part of the whole apparatus which the respondent was using or working was apparatus for wireless telegraphy, and, moreover, as the whole purpose and meaning of the respondent's act of inserting the plug into the socket was to set to work for him, and make useful for him, a transmission of wireless messages, which had involved the working of the apparatus as a whole, he was guilty of unlawfully working apparatus for wireless telegraphy without a licence.

- E **[EDITORIAL NOTE.]** The question here is purely a question of the construction of the Wireless Telegraphy Act, 1904, s. 1 (3). The wide use of plug-in loudspeakers in flats makes the case of considerable importance at the present time.

AS TO NECESSITY FOR LICENCE, see HALSBURY, 1st Edn., Vol. 27, Telegraphs and Telephones, pp. 385, 386, para. 768; and FOR THE WIRELESS TELEGRAPHY ACT, 1904, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 19, p. 289.]

- F **APPEAL** by way of case stated against a decision of a metropolitan magistrate sitting at Marylebone police court, under the Summary Jurisdiction Acts, 1857 and 1879, dismissing an information preferred by the appellant, Albert Samuel King, who was duly authorised by Walter Ernest Weston, on behalf of H.M. Postmaster-General, against the respondent, Hilary Carol Howard Bull, for that the respondent, on
G a day unknown, between a period six months prior to the laying of the information and July 28, 1936, at No. 2, Princess Court, in the district of Marylebone police court, unlawfully did work apparatus for wireless telegraphy without a licence contrary to the Wireless Telegraphy Act, 1904, s. 1 (3).
H The facts are set out in the judgment of LORD HEWART, L.C.J. The appellant contended that the respondent was guilty of the offence charged in that the premises occupied by the respondent were a separate residence, apart from the premises in which the receiving sets were placed, and that the loudspeaker wire and plugs installed in the premises were

apparatus for wireless telegraphy within the meaning of the Wireless Telegraphy Act, 1904, s. 1 (3). It was further contended that the respondent had worked the loudspeaker within the meaning of the Act, by placing the plug attached to the loudspeaker into the sockets, and thereby receiving broadcast wireless programmes, and that the fact that the loudspeaker, when working, was connected by wires to one of the two receiving sets was immaterial, for the reason that all messages passing along the wires were wireless telegraphy within the meaning of the Act and the Wireless Telegraphy (Explanation) Act, 1925. A

The respondent contended that he was not guilty of the offence charged, on the ground that the loudspeaker was not apparatus within the meaning of the Act, that the loudspeaker was not apparatus, but was an instrument, that the act of placing the plug attached to the loud speaker into the socket did not constitute a working of the loudspeaker, that the two receiving sets constituted the apparatus for receiving wireless telegraphy within the meaning of the Act, and that the tuning and switching on and off of the two receiving sets constituted the working of the apparatus within the meaning of the said Act. B C

The magistrate held that the act of placing the plug attached to the loudspeaker into the socket did not constitute a working of wireless apparatus within the meaning of the Act, and dismissed the information. Thereupon this appeal was brought. D

The Solicitor-General (Sir Terence O'Connor, K.C.) and J. P. Ashworth for the appellant.

D. P. Maxwell Fyfe, K.C., and Hugh Saunders for the respondent. E

The Solicitor-General: Although it may be part of a larger whole, the loudspeaker is apparatus within the meaning of the Act. It does not follow that, because the landlord did something in operating and tuning the receiving sets, the tenant had nothing to do. The respondent "worked" the apparatus by placing the plug attached to the loudspeaker into the sockets, and receiving broadcasting wireless programmes. "Work," in this sense, has been defined as "set in action" or "cause to act." F

Maxwell Fyfe, K.C.: The Act of 1904 should be construed strictly against the Crown, as it contains both fiscal and penal provisions. The word "apparatus" has a collective meaning, and is not apt to describe a single instrument, such as the respondent's loudspeaker. The respondent did not "work" the apparatus, which, in the shape of receiving sets, was worked by another person. The respondent could only tap the results of the working of the apparatus by the other person. Moreover, wireless telegraphy ceased when the sound-waves reached the receiving set. The Act only requires a licence to receive wireless broadcast from the air, but not to receive it after transmission over a wire. G H

LORD HEWART, L.C.J. : This is a case stated by one of the magistrates of the police courts of the metropolis. It arises out of an information preferred by the present appellant against the present respondent, charging him with unlawfully working apparatus for wireless telegraphy without a licence, contrary to the Wireless Telegraphy Act, 1904, s. 1 (3). The learned magistrate, having heard the evidence, dismissed the information, and the question for this court is whether, in coming to that conclusion, he came to an erroneous decision in point of law.

The relevant facts may be very briefly repeated. The respondent was at the material time occupier and tenant of certain premises, which consisted of a self-contained flat, being one of a block of similar flats, all the property of the same landlords. Then the case says :

There were installed in separate premises in the said block of flats occupied solely by the landlords their servants or agents two wireless receiving sets for which the landlords were liable to pay the 10s. receiving licence. Each of the said receiving sets was fitted with an amplifier, which was connected by wires to a corresponding socket installed in each of the said flats, including the said premises occupied by the respondent. In the said premises, the respondent had installed a loudspeaker, fitted with a wire and a plug, which said plug he had, from time to time, during the period mentioned in the information, inserted into one or other of the said sockets and had thereby received the broadcast programme—

from one station or another. The case finds :

It was not possible for the respondent to obtain reception of broadcast programmes through the said loudspeaker without inserting the said plug into one or other of the said sockets.

The respondent himself had no licence. Finally, the case finds that :

The operation and tuning of the two receiving sets were under the control of the landlords their servants or agents. The said sets were switched off every night at 11 p.m.

In those circumstances it was contended on behalf of the appellant, among other things, that the loudspeaker wire and plugs installed in the particular flat were apparatus for wireless telegraphy within the meaning of sect. 1 (3) of the statute. But the contention did not end there ; it was submitted further :

that the respondent had worked the loudspeaker within the meaning of the said Act by placing the plug attached to the loudspeaker into the sockets, and thereby receiving broadcast wireless programmes ;

and finally :

it was contended that the fact that the loudspeaker, when working, was connected by wires to one of the two receiving sets was immaterial, for the reason that all messages passing along the said wires were wireless telegraphy within the meaning of the Act and the Wireless Telegraphy (Explanation) Act, 1925.

Those were the contentions on behalf of the appellant, and, *per contra*, it was contended for the respondent that the loudspeaker was not apparatus, but was an instrument, that the act of placing the plug into the socket did not constitute a working of the loudspeaker, and that the two receiving sets constituted the apparatus for receiving wireless

telegraphy, and that the tuning and switching on and off of the two receiving sets constituted the working of the apparatus within the Act. The learned magistrate has annexed to the case a copy of his judgment. It is a brief judgment, the point of which is to be found in a single sentence. He came to the conclusion that the word A
 “working” must mean tuning in; not that the tuning in was working, but that there was no other working but tuning in. In my opinion, that construction of the law, as applied to these facts, was erroneous.

The case has, I need hardly say, been argued before us with great skill and care, and I imagine that every point on both sides has been taken. B
 The important words, for the purposes of this case, are to be found in sect. 1 (3) of the Act of 1904 :

If any person . . . works any apparatus for wireless telegraphy without a licence—

he shall be guilty of an offence, and the matter, it is said, is complicated C
 or illustrated by the subsequent definition, which, in describing what wireless telegraphy is, employs the words, “without the aid of a wire.” The argument of substance is that, at the point where this respondent did what he did, the working, or, intransitively, the operation, of the wireless part of the matter had come to an end, and that what he did D
 was to add a new something to that apparatus, to wit, a wire, which was no part of the wireless apparatus. Now, it seems to me that that is an extremely unreal view of the matter. What was this respondent doing? In his own flat, and without a licence, he was seeking to have the advantage of the transmission of a wireless message from some- E
 where; it may have been from York, it may have been from Paris, it may have been from further afield, but from somewhere he wanted the message. As long as he did nothing, the message for him had no existence. In order to make the message reach him, and be real to him, he had to do the particular acts, or one of them, mentioned in the case. F
 What was he doing, then? He was undoubtedly making use, in the last stage of a very long journey, of a wire; but the function of that wire was to make the transmission of the wireless message useful for him. It seems to me to be perfectly immaterial that, in the last fraction of that path, whether the path was a mile long or a thousand miles long, G
 he used a bit of wire. He was doing what he did in order to work the wireless apparatus. The piece of wire that he used would have had no meaning or interest for him. By that means, he was tapping the wireless apparatus, which transmitted wireless messages; and, although it may well be that, in the year 1904, when the Wireless Telegraphy Act was passed, H
 the legislature had no conception of any such process or method, nevertheless that is of no importance if, by the words that were employed, the legislature brought such a proceeding within the net. Attractive as Mr. Maxwell Fyfe’s ingenious argument has been, I am satisfied that

what happened here is within the meaning of the words, "working an apparatus for wireless telegraphy." It seems to me that it can be put in various ways, but in particular in two, first, that, in the circumstances, the particular part of the totality of the apparatus which this respondent
A was using or working was apparatus for wireless telegraphy; but, secondly, and still more so, that the whole purpose and meaning of that last element in the total transaction was to set to work for him, and make useful to him, a transmission of the wireless messages, which had involved the working of the apparatus as a whole. I cannot help thinking
B that the view which the learned magistrate took of the matter was altogether too narrow. No doubt, of course, tuning in is to work the apparatus, but it is quite a different proposition to say that there is no working of the apparatus other than tuning in.

In my opinion, therefore, this appeal ought to succeed, and the case
C ought to go back to the learned magistrate with the direction that the offence which was charged was proved.

SWIFT, J.: The loudspeaker which was in the respondent's flat would have been absolutely useless for the purpose of receiving wireless
D messages, unless it was part of some other apparatus. In order to make it part of some apparatus, it was connected with a receiver, down in the basement, by means of a wire, and the two things together made the apparatus by which Mr. Bull received wireless messages, and it seems to me that, in joining together the two parts of the machinery
E which enabled him to hear the message, he was working an apparatus for the reception of wireless messages. I therefore agree that this case must go back to be dealt with in the way my Lord has indicated, for the reasons which my Lord has given.

F GODDARD, J.: I agree.

Appeal allowed, and case remitted back to magistrate, with a direction that the offence charged was proved.

Solicitors: *Solicitor to the Post Office* (for the appellant); *Perowne &*
G *Co.* (for the respondent).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

TAYLOR v. WEBB.

[COURT OF APPEAL (Slessor and Scott, L.J.J., and Farwell, J.), **January 27, 28, February 5, 1937.**]

Landlord and Tenant—Repair—Landlord's covenant—Exception of fair wear and tear—Deterioration by wind and rain—Non-repair—Consequential damage—Liability of landlord. A

A landlord covenanted in an underlease to keep the outside walls and roofs in tenantable repair, as he was required by the headlease to do. The covenant in the headlease contained an exception of damage by fire and fair wear and tear. Owing solely, as it was found, to the effect of wind and rain, certain roofs and skylights became defective, and as they were not repaired certain rooms in due course became uninhabitable. The tenant claimed damages for breach of the landlord's covenant to repair:— B

HELD: the question whether wear and tear is fair or reasonable is not affected by the amount of the dilapidation. In the circumstances the dilapidation of the roofs and skylights was not such as, upon a proper construction of the covenant as a whole, the landlord was bound to make good, and he could not be held responsible for the damage resulting from the neglect to repair. C

Decision of DU PARCQ, J. ([1936] 2 All E.R. 763) on this point reversed. Haskell v. Marlow (1) overruled.

[EDITORIAL NOTE. This case discusses as between landlord and tenant the exception of fair wear and tear in a repairing covenant. DU PARCQ, J., in the court below held that continued neglect to repair in time led to a state of dilapidation that could not be said to be due to fair wear and tear. The Court of Appeal have overruled this conclusion, and with it the case of *Haskell v. Marlow* (1) upon which it was based. All dilapidation caused by the normal action of the elements and reasonable wear and tear of human agencies is excepted from the covenant by the exception of fair wear and tear. The Court of Appeal did not deal with the other points in the case, the most important of which was the question of the independence of the covenant to repair and that to pay the rent reserved by the lease. D

AS TO EXCEPTION OF FAIR WEAR AND TEAR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 211, 212, para. 230; and FOR CASES, see DIGEST, Vol. 31, pp. 330, 331, Nos. 4736-4739.] E

Cases referred to:

- (1) *Haskell v. Marlow*, [1928] 2 K.B. 45; Digest Supp.
- (2) *Terrell v. Murray* (1901), 17 T.L.R. 570; 31 Digest 331, 4749.
- (3) *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507; 31 Digest 258, 3990. G
- (4) *Scales v. Lawrence* (1860), 2 F. & F. 289; 31 Digest 326, 4682.
- (5) *Horlick v. Scully*, [1927] 2 Ch. 150; Digest Supp.
- (6) *Davies v. Davies* (1888), 38 Ch. D. 499; 31 Digest 357, 5016.
- (7) *Winn v. White* (1772), 2 Wm. Bl. 839; 31 Digest 331, 4745.
- (8) *Graves v. Legg* (1854), 9 Exch. 709; 12 Digest 416, 3351.
- (9) *Bettini v. Gye* (1876), 1 Q.B.D. 183; 12 Digest 424, 3408. H
- (10) *Bastin v. Bidwell* (1881), 18 Ch. D. 238; 31 Digest 75, 2209.
- (11) *Dawson v. Dyer* (1833), 5 B. & Ad. 584; 31 Digest 125, 2589.
- (12) *Edge v. Boileau* (1885), 16 Q.B.D. 117; 31 Digest 125, 2590.
- (13) *Fingland & Mitchell v. Howie*, [1926] S.C. 319; Digest Supp.

APPEAL from a judgment of DU PARCQ, J., dated Mar. 6, 1936, and reported in [1936] 2 All E.R. 763.

D. N. Pritt, K.C., J. Ricardo, and J. E. S. Ricardo for the appellant.

L. M. Minty for the respondent.

- A *Pritt, K.C.* : All the damage that occurred was due to the action of the elements. The plaintiff never covenanted to repair the inside ; he cannot be liable unless there was some original fault of his ; he cannot be liable for consequences unless he was liable for their cause. [Counsel referred to : *Haskell v. Marlow* (1), *Horlick v. Scully* (5), *Manchester Bonded Warehouse Co. v. Carr* (3), *Davies v. Davies* (6), *Terrell v. Murray* (2), and *Winn v. White* (7).] There is no direct authority that a deed has been construed so that a tenant's covenant to pay rent and a landlord's covenant for repairs are interdependent ; covenants for quiet enjoyment and for payment of rent are wholly independent. Where there is
- C a covenant for quiet enjoyment, if the tenant fails to pay the rent, the landlord has well known remedies, and is not put to any expense. But a covenant to repair is different ; there the landlord may actually have to pay out money which the tenant has never paid him. It is submitted that, if the rent is not paid, the landlord need not repair. [Counsel
- D referred to *Graves v. Legg* (8), *Bettini v. Gye* (9), *Bastin v. Bidwell* (10), *Dawson v. Dyer* (11), and *Edge v. Boileau* (12).]

- Ricardo*, following on the same side : *Dawson v. Dyer* (11) and *Edge v. Boileau* (12) were wrongly decided, because they say that the covenants are independent. If that were so, if the landlord broke his covenant,
- E the tenant would have to go on paying rent ; that is not the case : *Fingland & Mitchell v. Howie* (13).

- Minty* : The question here is the meaning of the words "fair wear and tear" : it is submitted that they are mere surplusage. They cannot mean that there is nothing that the landlord has to do, and that
- F he can allow the building gradually to fall down under the influence of wind and rain. The obligation begins when the damage becomes so great that it causes inconvenience to the tenant, and the building starts to become untenable. The words mean the normal wear over the period that the tenant is there. The clause is put in for the tenant's
- G protection, to cover parts of the building not covered by a specific covenant to repair. The damage here was partly caused by the negligent way in which such repairs as were done were carried out. [Counsel referred to *Haskell v. Marlow* (1) and *Scales v. Lawrence* (4).]

- H SLESSER, L.J. : This appeal arises on a counterclaim by the defendant, who was the tenant of the plaintiff at all material times, for damages for breach of covenant to repair certain premises known as 7a, Pavilion Road, Chelsea. The obligation relied upon is contained in a lease dated Feb. 21, 1929, between the landlords, the Basil Garages, Ltd., who have

assigned their interest to the plaintiff, and the defendant, and the obligation of the landlord contained in cl. 6 (c) is to

keep the outside walls and roofs properly repaired and cleansed as and so far only as is required to be done by them under the headlease.

By that headlease of June 5, 1925, between the landlord and two tenants, from whom the present plaintiff derives title, the obligation of the tenants was, by cl. 3, during the term to keep the premises demised, and the fixtures, painting, papering, and decorations thereof : A

in good and tenantable repair, destruction or damage by fire and fair wear and tear excepted, B

so that, limiting the obligation to keep in good and tenantable repair to the outside walls and roofs, the definition of "properly repaired and cleansed" is subject to the exception :

destruction or damage by fire and fair wear and tear excepted. C

It is to be noted that, under this inartistic method of reference, the liability and exception are applied to the landlord to the extent to which he, as tenant, would have been liable under the headlease. The defendant, Mr. Webb, when he went into possession, in 1929, found the premises in a satisfactory condition, but three years later trouble arose, as is found by the learned judge, because of the landlord's failure to do repairs to the roofs and walls, including the skylight. According to the evidence of Mr. Page, an architect and surveyor, the effect of wind and rain was the cause of the condition of the skylight and roof. Mr. King, a builder, adds that the slates had cracked by age, wear, and tear ; the time and weather conditions caused the soakers to get out of repair, and decay of nailing, due to atmospheric action, caused the slates to slip. As a result, in 1934, the back rooms became uninhabitable, and are now derelict, and the passage, bathroom, and back living-rooms, are, admittedly, in a most serious state of disrepair. It is said that insects are infesting the premises as the result of damp, and that water fused the electric light, that the ceiling of the loft had fallen down through damp, and that the inhabitants contracted chills. Finally, the sanitary inspector, Mr. Crandell, on Feb. 25, 1936, said that he would have to take proceedings. D E F

In these circumstances, it is said, in the counterclaim, for the plaintiff's claim for rent due is not before this court, that the plaintiff, the landlord, is liable for damages for breach of covenant to repair, and the question of law arises, what, under his covenant to keep the outside walls and roofs properly repaired, fair wear and tear excepted, is the landlord's obligation ? In the first place, I would observe that, on the evidence, it is clear that the whole of the resulting damage has followed from the defective condition of the roofs, walls, and skylight, as to which, according to Mr. Page, there has been neglect of pointing, bridging, and flashing, and that such defective condition is due solely to the G H

operation of natural causes of wind and weather and natural decay. In my opinion, on the uncontradicted evidence, it is impossible to say that the condition of the walls and roofs is the result of anything other than fair wear and tear. Wear and tear may, of course, arise from the operation of natural process, or through the result, direct or indirect, of human agency, and the meaning to be attached to the adjective "fair" may vary accordingly. In this case, no question of propriety of user by the landlord arises, and we have not here to consider the difficult problem of at what point interference by him with the walls and roofs covenanted to be repaired might amount to a user, which would negative the exception of fair wear and tear, as might conceivably arise, if the landlord had, by weakening the power of the structure to resist the effect of the elements, or otherwise, in one way or another, caused the resultant damage. So, dealing only with the effect of the passing of time and the weather, I agree with SALTER, J., in *Haskell v. Marlow* (1), at p. 57, that the words "fair" or "reasonable" cannot appropriately be used to qualify the forces of nature, and that, in such a context, they can mean only the normal action of the elements. Treating the word "fair," therefore, in the absence of any question of human user of roofs and walls, as applied to the problem of physical exposure, as synonymous with "normal," that is what the parties would reasonably anticipate. The facts of this case seem to me to bring the absence of repair, resulting in the deterioration of walls and roofs, directly within the exception which excludes the landlord from the obligation of reparation. Reliance has been placed by DU PARCQ, J., on the decision of the Divisional Court, on appeal from an official referee, in *Haskell v. Marlow* (1), which, on its facts, seems indistinguishable from the present case, and he has purported to follow it; if it is correct, this appeal should fail. In that case, a testator had devised a dwelling-house to his wife for her life, she keeping the same in good repair and condition (reasonable wear and tear excepted). After his death, the widow remained in the house for 42 years, when it was found to be in a "very shocking state of disrepair." As in this case, nothing had been done actually to injure the house, but the widow had omitted almost entirely to repair it, and had done little to counteract the decay. The action was brought by the trustees of the will against the executors of the widow for compensation. In the words of SALTER, J., at p. 57:

On those facts I have some difficulty in holding that these dilapidations were not caused by reasonable wear and tear,

but he came to the conclusion that they were altogether unreasonable in amount, and inconsistent with the plain intention of the testator (at p. 57), though earlier he seems to treat the case of a will as raising similar problems to the case of a lease (at p. 50). For the purpose of the present case, the problem of the intention of the testator may be disregarded,

but, in so far as it is suggested that the amount of dilapidation may be said to make wear and tear, which would otherwise be reasonable or fair, unreasonable and unfair, I am unable, with respect, to agree. The learned judge says, at p. 56, that, in his opinion :

such words as "fair" and "reasonable" . . . qualify both the destructive agencies and also the dilapidation. A

He cites the case of *Terrell v. Murray* (2) and *Manchester Bonded Warehouse Co. v. Carr* (3) as authorities for employing these double criteria. In the *Manchester* case (3), LORD COLERIDGE, C.J., delivering the judgment of the court, points out, at p. 513, that : B

reasonable wear and tear can include destruction by reasonable use. These words, no doubt, include destruction to some extent, e.g., destruction . . . by ordinary friction,

and I am unable to see that the case is any authority, when considering the meaning of "fair wear and tear," for looking to the degree of destruction produced. In *Terrell's* case (2), BRUCE, J., includes, in the exception "reasonable wear and tear," friction of the air, and dilapidation caused by exposure, and there is no suggestion, in his judgment, that the amount of such dilapidation may become unfair or unreasonable on account of its amount. I can find no authority for the view, expressed by SALTER, J., in *Haskell's* case (1), that the amount of the dilapidation can, in itself, make it unreasonable, when it is occasioned by normal wear and tear of the elements, and, in so far as he appears to base his judgment on that consideration, I disagree. TALBOT, J., as I read him, proceeds upon a different principle. He agrees, at p. 59, that reasonable wear and tear means, "the ordinary operation of natural forces," but goes on to say that : C
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E

the exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear . . . it does not mean that if there is a defect originally proceeding from reasonable wear and tear the [covenantor] is released from his obligation to keep in good repair and condition as to everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce. F

Again, with regret, I am constrained to differ. If, in fact, the landlord, as here, can be heard to say that he is required to keep only the outside walls and roofs properly repaired, in cases where fair wear and tear are excepted, and if there be no case against him, other than for dilapidation to walls and roofs through fair wear and tear, he has committed no breach of his covenant, and is under no obligation. In these circumstances, I am unable to see how, if he was under no obligation to repair, he can be held responsible for the consequential damage which flowed from an obligation to repair walls and roofs, when that obligation was not his. G
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It will be observed that, in this case, unlike the case of *Haskell v.*

Marlow (1), there was no general obligation to keep the dwelling-house in good repair and condition, but only the walls and roofs, and, for the reasons which I have stated, I have come to the conclusion in this case, on the facts, that the landlord had no obligations whatever with regard
A to reparation, and I think that *Haskell's* case (1) was wrongly decided. This appeal, therefore, succeeds, and the judgment of DU PARCQ, J., giving damages on the counterclaim, must be reversed.

SCOTT, L.J. : In the King's Bench Division, the plaintiff obtained
B judgment for arrears of rent, execution being stayed pending the trial of the counterclaim, in which the defendant claimed damages against him for breach of his covenant as under-lessor to repair. That issue was tried before DU PARCQ, J., and the learned judge gave judgment on the counterclaim for the defendant, as under-lessee, for £130 damages.
C The plaintiff appealed, the stay of execution of his judgment for rent being continued, pending the appeal.

Two points were taken on behalf of the appellant, both below and before us : first, that, on the facts in evidence or admitted, there was no breach, and, secondly, that the landlord's covenant to repair was con-
D ditional upon performance of the tenant's covenant to pay the rent. As this court is in favour of the appellant on the first point, and is allowing the appeal on that ground, it is unnecessary to express any opinion on the second. The issue on the first point turns upon the correct interpretation of the landlord's repairing covenant in the under-
E lease of the premises in question, which, as agreed between counsel before us, by assignment became binding on the plaintiff and the defendant respectively. It is in these words :

The landlords will at all times during the said term keep the outside walls and roofs properly repaired and cleansed as and so far only as is required to be done by them under the lease under which they hold the demised premises.

F The lessee's covenant in the headlease thus referred to is in these terms :

The tenants will during the said term keep the premises hereby demised . . . in good and tenantable repair, destruction or damage by fire and fair wear and tear excepted.

It is these two combined sentences which we have to construe ; but
G it will be convenient, before discussing their meaning, to summarise the facts to which the covenant has to be applied. So far as material, they are stated, expressly or by implication, in the judgment of DU PARCQ, J. The premises consisted of a ground-floor shop, a staircase, and a first floor over the shop, and extending also over a garage,
H next to and behind the shop. The front portion of the first-floor had an ordinary roof over it, the passage and bathroom behind had a glass covering, and the back rooms were attics, lit by sky-lights. The learned judge held, and I think rightly, that the glass covering and the sky-lights were part of the roofs mentioned in the covenant, and therefore

within the landlord's obligation. When the respondent went into possession, in 1929, he found the premises in a satisfactory condition of repair. During the subsequent years of his tenancy, the roofs, sky-lights, and glass-covering over the passage-way got into a seriously defective condition, and this led to consequential damage by wet and damp inside the premises, amounting to "a serious state of disrepair" in important parts of the interior. The learned judge does not expressly find that this defective condition was caused solely by the ordinary wear and tear of the elements, namely, by wind and weather, nor that it was in any way attributable to any "unfair" use of the premises by anybody; but I think that findings of fact to that effect are implicit in the express statement in the judgment that "the evidence of the defendant's architect was not exaggerated," for the learned judge's note of the evidence of the architect makes it quite clear that, in the architect's opinion, the whole of the damage in question was directly caused by rain-water getting through the roof, sky-lights, and glass-covering, the wind and weather having produced the leakages; and, according to the architect's evidence, none of the disrepair had been caused by any positive action on the part of the respondent, and there was no suggestion, either, that any of it had been caused by any positive acts of the appellant. The existing condition was due solely to the elements, and to the fact that nothing had been done to arrest existing, or prevent further, decay.

Strange as it may seem, this common exception in repairing covenants in leases, "fair" (or "reasonable") "wear and tear excepted" has never come up for judicial consideration in either the House of Lords or the Court of Appeal, although it has, of course, often been considered and applied in courts of first instance; the only detailed analysis of it is in the Divisional Court decision of *Haskell v. Marlow* (1), to which my Lord has referred. In the present appeal, we are called upon to consider it; but, even so, our task is not quite the ordinary one, as we have to construe the words removed from their normal context of a tenant's covenant, and transported into the text of a landlord's covenant. The result of this incorporation is to produce a topsy-turvy covenant by a landlord, seeking to measure his obligation as landlord in an under-lease by the scope of his commitment as tenant in the head-lease. In order to construe it, the first step must be to ascertain the meaning of the incorporated tenant's covenant, as it stood by itself in the head-lease. The phraseology of that covenant is in absolutely common form:

that the tenant will keep the premises in repair [describing the degree required] destruction or damage by fire and fair wear and tear excepted.

One's first impression is that the meaning is quite plain, but second thoughts call for careful analysis. The covenant must, of course, be read as a whole, and one must not make the mistake of assuming that,

because one can divide it into different parts, any one part can be read as if it stood alone—as, for instance, that the undertaking to repair covers the whole ground, and that the exception is a mere qualification of a pre-existing obligation. But, subject to that caution, the covenant

A does divide into three parts, (i) the earlier words, which, taken by themselves, impose on the tenant a general obligation to repair, an obligation which, if it stood alone and unqualified, would apply to all defects, whatever their cause; (ii) the words of exception, which prevent the earlier words from operating as a general obligation, for they wholly

B cut out certain causes of defect, namely, accidental fire and wear and tear (with the meaning of these last words I will deal in a moment); (iii) the proviso attached to the exception of wear and tear, namely, that the tenant is not to enjoy the benefit of it if the wear and tear has been brought about through an unfair (or unreasonable) user of the

C premises by himself, or by any person for whom he is responsible, that is to say, his licensees.

The phrase “wear and tear” is a very old English idiom, and the clause “fair” (or “reasonable”) “wear and tear excepted,” has been common in leases and tenancy agreements for two or three centuries.

D It is, like many idiomatic expressions, complex in meaning; it implicitly refers to both cause and effect, and, in each aspect, it covers two classes of disrepair, (a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather, in contradistinction to abnormal or extraordinary events in nature, such as lightning, hurricane,

E flood, or earthquake; and (b) that brought about by the tenant, and other persons present in or on the premises with the consent of the tenant, either unintentionally or as a normal incident of a tenant’s occupation, in the course of the “fair” (or “reasonable”) use of the premises for any of the purposes for which they were let. Sense (a), the

F first of the two senses covered by the phrase “wear and tear” when used in repairing covenants, is somewhat analogous to the sense of the words when used in marine insurance. There the perils of the sea, against which the policy protects, are exceptional or abnormal marine events, at least in point of degree, and sufficiently so to constitute them

G “accidents”: and a line was drawn, in old sailing-ship days, between the normal damage and cutting away of sails, spars, and ropes incidental to ordinary heavy weather on the one hand, which does not constitute a peril insured against, and an abnormal casualty, which does; and the old law, and even the old idiomatic phrase, reappear in statutory guise

H in the Marine Insurance Act, 1906, s. 55 (2) (c). So, in the law of landlord and tenant, legal interpretation of the phrase, as applied to the elements, has produced a similar demarcation of degree between the normal and the abnormal, the ordinary and the extraordinary; leaving a penumbral zone where a jury may wander and lawfully come to its own conclusion,

a zone of "give and take" decisions, as WILLES, J., said, in *Scales v. Lawrence* (4), at p. 291. That the phrase "wear and tear" includes in its scope my sense (b), namely, the tenant's user and its effect, is too plain to need argument, and is well recognised in the decided cases. Having thus seen what is covered by "wear and tear," the next step is to construe the word "fair." As an aid to interpretation, it is important to remember that the word "reasonable" is just as common in the clause as the word "fair," the one being used, for practical purposes, as synonymous with the other. Therefore, presumably, the word "fair" is not intended to be read as having a wholly different attribution from that of the word "reasonable." The latter word is incapable of being attributed to the elements, the wind and weather. It can sensibly and properly be attributed to the way in which the tenant uses the premises. In my view, "fair" has a similar attribution; it is applicable, whether as an adjective or as an adverb, to the conduct of the tenants in "using" the premises. Neither "reasonable" nor "fair" can apply to the elements as a cause of wear and tear; the elements cannot be either fair (except in the meteorological sense) or reasonable. Nor can either word be used as applying to the effects of the elements; the phrase cannot mean a fair amount of resultant wear and tear, as a countryman may speak of a "fair"-sized turnip. In my view, the word "reasonable" or "fair" applies only to the treatment of the premises by the tenant. This reasoning leads me to the conclusion that the phrase "fair" (or "reasonable") "wear and tear" is an elliptical idiom, in which only a part of the well understood meaning is expressed. The effect of either epithet is to prevent the tenant having *carte blanche* as to his user of the premises; the word is a stipulation simply and solely about his conduct, limiting his right to rely on the exception, where the state of disrepair has been caused by him or his invitees, by a proviso that such tenant's user must have been "fair" (or "reasonable"). If he uses the premises "unfairly" (or "unreasonably"), he loses *pro tanto* the benefit of his exception.

The next step in construction is to consider what meaning, if any, the words "fair wear and tear excepted" would have, if expressly inserted in a landlord's covenant to repair. "Wear and tear" would plainly still include the effects of normal and ordinary natural causes, like wind and weather. But what about the "fair user" of the premises, implied by the words in the tenant's covenant? The position of the landlord in relation to the demised premises during the term presents little analogy to the position of the tenant. He is not going to occupy the premises. On the other hand, in exercise of his right of entry, or of using a party-wall, or other land adjacent or subjacent, he might cause damage to the demised premises, and I see no reason why, in regard to such acts, the limiting provision of behaving fairly or reasonably should

not apply. But, in the present case, the words were not written *in extenso* in the landlord's covenant; they were brought in by reference only, and for a limited purpose, namely, to restrict the scope of the landlord's covenant to the high-water mark of the liabilities in fact incurred by him as lessee under the headlease. It is further to be observed that, in the present case, the question whether, in respect of main walls and roofs, the appellant was immune as regards all wear and tear, or only on condition of his using them "fairly," is immaterial. The learned judge in effect found, and, in my view, rightly found, that the whole of the disrepair was due to the elements, coupled with the absence of any steps by anybody to prevent further progress of the decay: there was no suggestion of any "unfair" user by anybody, either tenant or landlord.

Out of deference to DU PARCQ, J., and also to the late SALTER, J., and the present TALBOT, J., who decided the case of *Haskell v. Marlow* (1), which the learned judge followed, I desire to explain exactly why I disagree with the reasoning upon which that case was decided. A testator had devised a dwelling-house to his wife for her life, she insuring the same against loss by fire:

and also keeping the same in good repair and condition (reasonable wear and tear excepted).

The widow occupied the house for 42 years, doing no repairs, and, as a result of the wear and tear of the elements, the premises fell into a bad state of decay. She then died, and the trustees of the will, on behalf of the remaindermen, sued her executors. The official referee gave the plaintiffs £550 for dilapidations. It was contended, on appeal, by Mr. Rayner Goddard, as he then was, for the defendants, that the words in question merely expressed the position at law of a tenant for life, namely, freedom from liability for permissive waste, but the court dismissed the appeal, both judges concurring in the conclusion, but reaching it by quite different paths. SALTER, J., in effect, held that the obligation to repair was "the dominant intention," and that the exception was merely a minor modification of it. He then quoted certain cases in which judges had "laid very little stress on the exception," and inferred an opinion, on their part, that the exception did not "make any great or grave inroad on the general liability to repair." Finally, he decided that the word "reasonable" or "fair" qualified both the destructive agency and the amount of dilapidations, that is to say, the quantum of effect produced by wear and tear, and that, in its application to both cause and effect, it meant the same as the word "normal." For the reasons already given, I disagree with these views. TALBOT, J., without expressing either dissent from, or assent to, the views of SALTER, J., put his judgment on quite different grounds. He discerned a new condition, not expressed, but implied, in the exception, namely, that the disrepair

should have been directly caused by the wear and tear, and then said, at p. 59 :

It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition as to everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

I disagree with both his views. I see no justification for implying the word "directly" when it is not there, except in so far as the *causa proxima* is *prima facie* always to be sought. But this is not his meaning of the word "directly," for it would not lead to the vital conclusion on which his judgment rested, namely, that, given natural causes in operation, and producing wear and tear, the covenant throws upon the covenantor a positive duty of stepping in and spending money in order to arrest the wear and tear due to those causes. This, in my opinion, is to remould the clause which the parties agreed to put in, and is not interpretation; it is therefore wrong. His view as to the duty of preventing damage by wind and weather may be tested by a question. At what stage in the process of natural decay does the duty arise to effect repairs and prevent the further ingress of the elements? On the first leak? If so, the exception is made meaningless. Upon nature's enlargement of the leak? Where is the line to be drawn? There is no such limitation of degree in the exception. In my view, the mere operation of normal wind and weather does not, at any stage, confer on the covenantee the right to call on the covenantor to come in and effect repairs, in order to prevent further effects of wind and weather.

I do not propose to discuss any of the cases which were considered either in *Haskell v. Marlow* (1), or by DU PARCQ, J., in the present action, because that learned judge based his legal conclusion expressly on the passage of the judgment of TALBOT, J., on p. 59, which I have quoted. The foundation of fact to which he applied it was that the whole of the disrepair had been caused by natural wear and tear; and there was neither allegation nor evidence before him of any "unfair" behaviour of either party against the other in relation to the premises, so that no question of onus of proof ever arose. Omission to prevent cannot give rise to a cause of action where there is no duty to prevent. *Haskell v. Marlow* (1) was a case of a tenant for life and a remainderman; but the words there were the same as the usual exception in a lease, and I see no ground for construing them differently. I think the clause was wrongly interpreted in that case, and that the appeal before us must be allowed, and judgment entered for the appellant on the counterclaim.

FARWELL, J. : The facts in this case have already been stated, and it is unnecessary for me to repeat them. It is sufficient to say that, by the under-lease of Feb. 21, 1929, the under-lessor, who is the appellant,

- covenanted, in effect, to keep the outside walls and roof in good and tenantable repair, fair wear and tear excepted. Under that covenant, the lessor is *prima facie* liable for the serious state of disrepair into which admittedly, the walls and roof have fallen, unless he can show (and the
- A onus is on him) that that condition is due wholly to fair wear and tear. The meaning of the exception, in such a case as this, is, in my judgment, that the lessor is under no liability for disrepair due solely to such ordinary natural causes as may fairly be said to have been in the contemplation of the parties, for example, wind and weather, assuming no abnormal
- B use of the property by him. The evidence in this case, as proved at the trial, and as found by the learned judge, either expressly or inferentially, was such as to bring the cause of the disrepair within the exception, and, therefore, it would seem that the lessor must escape liability. The learned judge in the court below, however, has held him liable to the
- C extent of £130. On behalf of the respondent, it was argued that that decision was right on two grounds. It was said that to import such an exception into the covenant by the lessor with regard to outside walls and roof was, in effect, to render the covenant nugatory, and that, therefore, the words should be treated as mere surplusage. It is no
- D doubt the fact that the inclusion of the exception in this covenant reduces very materially the liability of the lessor, and may enable him, in many cases, to escape liability altogether, but the exception has been inserted in the covenant, and I can see no justification for disregarding it. In construing the covenant, the court is bound to read it as a whole, and,
- E accordingly, this argument, in my judgment, cannot avail the respondent. The other argument, as I understand it, was that, although the lessor may have been originally under no liability, yet, by standing by and doing nothing, with the result that the state of disrepair grew steadily worse, he must now be held liable. This contention I fail wholly to
- F understand. The non-performance, even for a long period, of acts for which the covenantor was under no initial liability cannot create a liability.

- The learned judge, in coming to the conclusion to which he did, followed a decision of the Divisional Court in *Haskell v. Marlow* (1).
- G That decision was binding on him, and he no doubt was right to follow it, but, in my judgment, that case was wrongly decided, for the reasons which have already been given by the other members of the court.

In the result, I think that the decision in the court below was wrong, and this appeal should be allowed.

- H *Appeal allowed, with costs. Leave to appeal to the House of Lords refused.*

Solicitors: *Martyns & Gane* (for the appellant); *J. Prag* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re WEBSTER, GOSS *v.* WEBSTER.[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
December 14, 1936.]*Executors—Legacies—Demonstrative legacy—Legacy payable out of share of A
partnership.*

By his will a testator bequeathed to his son "the sum of £3,000 to be paid to him out of the share of my capital and loans in the business of W. & B., and I direct that provided [the son] shall within 6 months of my death be accepted by the remaining partners in the said business as a partner as from the date of my death upon terms mutually acceptable to [the son] and the remaining partners of the said business the said legacy of £3,000 or any part thereof shall not be withdrawn by [the son] until after the expiration of 12 months from the date of my death, and in the meantime shall bear interest at the rate of £5 per cent. per annum":—

HELD: the bequest was a demonstrative legacy and not a specific one.

[EDITORIAL NOTE. There is no doubt that where a legacy is payable out of a partnership share, it is a demonstrative legacy. The question upon which a difference of view has arisen is whether provisions allowing in certain circumstances the amount to remain in the partnership at interest convert the legacy into a specific one. The Court of Appeal were unanimously against this view, which, however, had found favour with FARWELL, J.

AS TO DEMONSTRATIVE LEGACIES, see HALSBURY, Hailsham Edn., Vol. 14, p. 338, para. 630; and FOR CASES, see DIGEST, Vol. 23, p. 388, Nos. 4585-4590.]

Cases referred to:

- (1) *Paget v. Huish* (1863), 1 Hem. & M. 663; 39 Digest 177, 662.
- (2) *Mann v. Copland* (1817), 2 Madd. 223; 39 Digest 182, 708.
- (3) *Ellis v. Walker* (1756), Amb. 310.

APPEAL from an order of FARWELL, J., made on June 17, 1936, in an originating summons taken out by one of the executors and trustees of the will, dated July 21, 1933, of Frank Samuel Webster, who died on Mar. 10, 1936, for the determination of certain questions as to the true construction of the said will. The part of the judgment appealed against was in respect of the construction of cl. 5 of the will, the provisions of which are set out in the judgment herein of LORD WRIGHT, M.R. The learned judge, having held, for reasons which are referred to in the judgments herein, that the bequest in the said clause to the testator's son Frank Eric Webster, the first defendant to the summons, was a specific legacy, the said defendant appealed.

Sir Gerald Hurst, K.C., and *R. H. Hodge*, for the appellant.

Charles Harman, K.C., and *W. S. Wigglesworth*, for the respondents, who claimed to be beneficially entitled in reversion to the residuary estate of the testator.

LORD WRIGHT, M.R.: This appeal raises a short and interesting point. It is an appeal from FARWELL, J., and the question is whether

a certain bequest in a will is a specific or a demonstrative gift. The testator, Frank Samuel Webster, made a will dated July 21, 1933, in which he disposed of his property in various directions. I need not trouble about any of the clauses except one, because it stands by itself, and no light, in my judgment, is thrown upon it by considering the other clauses, and I therefore resist the temptation of dwelling on cl. 6, which Sir Gerald Hurst has invited me to do. Cl. 5, I think, I should read in full. It is in these terms :

I bequeath to the said Frank Eric Webster [that was the testator's eldest son] the sum of £3,000 to be paid to him out of the share of my capital and loans in the business of Webster & Bullock, City Meat Market, Birmingham, and I direct that provided the said Frank Eric Webster shall within six months of my death be accepted by the remaining partners in the said business as a partner as from the date of my death upon terms mutually acceptable to the said Frank Eric Webster and the remaining partners of the said business the said legacy of £3,000 or any part thereof shall not be withdrawn by the said Frank Eric Webster until after the expiration of 12 months from the date of my death, and in the meantime shall bear interest at the rate of £5 per centum per annum.

The testator had been a partner in the business described in that clause, and the only provision in the partnership deed that I need refer to is a provision :

that on the death or retirement of any partner no allowance should be made to him or his representatives in respect of the value of the goodwill of the said business, but the share of such deceased or retiring partner should be ascertained in the usual way, and the surviving or remaining partner or partners should have the option of liquidating the amount thereof to the person duly authorised to receive the same by four equal quarterly instalments, calculated from such death or retirement as aforesaid with interest at the rate of £5 per centum per annum.

There is one other matter to which I need refer—a matter of fact—and that is that it appeared, shortly after the testator's death, on a provisional balance sheet which had been prepared of the affairs of the firm, that the account showed a deficit of £1,901 16s. 3d., due from the testator's estate to the said firm. Whether that is the true and eventual position, I do not know, but I need not consider further the question as arising here, because, either in fact, or in expectation, or in probability the testator's interest in the firm will not amount to £3,000, and may amount to nothing at all. That being so, the question has been raised whether the bequest is a demonstrative or a specific gift. Whether that is so is to be determined on a construction of the clause, with such help as any other part of the will may afford, and, in this case, that appears to me to be non-existent, but the clause has to be read as a whole. It may be convenient here to refer to the judgment of SIR WILLIAM PAGE WOOD, V.-C., in the case of *Paget v. Huish* (1), at p. 671 :

These are, therefore, the three classes of gifts : First, a general gift, in which no special fund is pointed at for payment ; secondly, a specific gift out of a particular fund alone ; and, thirdly, a gift where a particular fund is pointed out as primarily applicable, but where the gift is not to fail by the failure of the particular fund. In this case I think there is a clear intention that the gift should take effect in any event, because, after bequeathing several legacies, the testator proceeds thus : " I give and devise the following annuities," specifying them, and then adds a declaration that these annuities shall be paid by the trustees out of the rents of the

real estate thereby devised. Subsequently, there is a gift to the trustees of all the real estate and the residuary personal estate, upon trust, out of the rents of the realty to pay the annuities, and subject thereto to apply the real and residuary personal estate upon certain specified trusts. All this appears to me only to show that the testator, after making a positive gift, points out the particular fund which he desires to have first applied, and which he supposes to be adequate for the purpose. It is clear that he preferred that the gift should be satisfied out of the realty rather than the personality; but the question now is, whether he preferred that it should fail altogether rather than be thrown upon the personality. I think the case is very similar to *Mann v. Copland* (2), and that there is no indication of an intention that the gift was to fail on failure of the real estate. A

Applying that here, I ask myself whether there is an indication of an intention that the gift was to fail on failure or insufficiency of the partnership interest. Now, the first words, "I bequeath to the said Frank Eric Webster the sum of £3,000," are, in themselves, obviously appropriate only to a specific gift. Then come the words: B

to be paid to him out of the share of my capital and loans in the business of Webster & Bullock, City Meat Market, Birmingham. C

These words ought, I think, to be construed as meaning "to be paid to him primarily out of the share," and not as meaning "to be paid to him only out of the share of the capital and loans." That is very much on the same lines as the view expressed by PAGE WOOD, V.-C., in the case to which I have just referred. D

So far, I should think, and this was what the learned judge also thought, that the gift is clearly a demonstrative legacy. Then comes the remainder of the clause which I have read. Now, that does not, in my judgment, change the character of the gift; it provides for what is to happen in a particular contingency, which may or may not occur; in fact, it did not occur, but, if that contingency had occurred, then the payment of the legacy, or some part of it, might have to be postponed. In so far as it was to be paid only by being withdrawn from the partnership assets, it was to remain there until after the expiration of 12 months from the date of the death. That means that it was for the benefit of the partnership, and to that extent for the benefit of the son, because it only applies if he became a partner; and it would mean that, instead of the testator's interest being paid out in four quarterly instalments, it should remain unaffected for the whole period of 12 months. But, in my opinion, the addition of that purely conditional and hypothetical clause does not change the character of the original words, which are clearly words appropriate to making a demonstrative gift. E F G

Mr. Harman has referred to a case of *Ellis v. Walker* (3), which is discussed in ROPER AND WHITE'S LAW OF LEGACIES, 4th Edn., Vol. 1, p. 201. That case, in my opinion, is entirely different from the present case. In that case, as stated by ROPER: H

A., the partner of B., bequeathed to B. £2,000 which appeared to be due to A. on the last settlement, in trust, to pay the interest of £1,000 to his (A.'s) mother, and the interest of £300 to his aunt, for their lives; and after their death he gave £1,500 to C. and £500 to D. "if he did not draw it out of the trade before he died."

It was held there that it was not a gift of the £2,000 debt, but of so much out of the partnership stock :

yet, said his Lordship, the latter words, " if I do not draw it out of the trade," make great alteration, and in my opinion make the legacy specific.

- A There is a further comment on that case, to which Mr. Harman has drawn attention, on pp. 231, 232, of the same volume :

The case of *Ellis v. Walker* (3) proves that unless the testator had clearly shown that he intended to bequeath the identical sum due to him upon the last settlement of partnership accounts by the explanatory words " if I do not draw it out of trade," the form of bequest to B. of £2,000 " which appeared to be due to the testator on the last settlement in trust, etc.," would not have been a sufficiently clear manifestation of an intent to make the legacy depend upon the existence of such a fund, as well from the nature of the fund, as the manner in which the legacy was given, viz. of a sum of money ; for the clause that immediately followed the gift was merely descriptive of the property out of which the legacy was to be paid, i.e., what, if any thing might be due to the testator in respect of his share of the partnership stock, a fund quite contingent, as depending upon the result of the partnership accounts, and not a substantive independent bequest of such share itself. Such was the reasoning of LORD HARDWICKE, and who expressed his opinion that the legacy of £2,000 would have been general, except from the marked words " if I do not draw it out of trade."

- Now, these vital words seem to me to be completely different in character, for this purpose, from the words which I find in this clause under consideration. I differ, with the greatest hesitation and deference, from the learned judge, but I find, in the subsequent conditions in cl. 5, nothing sufficiently clear to destroy the effect of the governing words in which the gift is made. These words are, I think, apt to create a demonstrative legacy, and I think it should be so held, and the appeal from the learned judge should be allowed.

- ROMER, L.J. : I agree. FARWELL, J., came to the conclusion that the words of the proviso, which LORD WRIGHT, M.R., has read, indicated that the testator's intention was that this legacy of £3,000 was specific, and not demonstrative. It is there that I find myself in disagreement with the learned judge. If the legacy be specific, then, if, and in so far as, the testator's share in the partnership be insufficient to pay it, the legacy would fail ; if it be demonstrative, then, if, and in so far as, the state of the share in the partnership be unable to pay it, it would be paid out of the general estate of the testator. With all respect to the learned judge, I fail to see how any light is thrown upon the question of whether that deficiency is to be borne by the general estate, or must fail altogether by the fact that, in this proviso, he directs that, in a certain event, the share in the partnership, whichever it may be, shall not be paid in the manner directed in the partnership articles, but shall remain in the business for 12 months from the testator's death. I think the proviso throws no light on the question whether the legacy be demonstrative or specific. On the other hand, it appears to me the words that precede the proviso throw the greatest possible light upon that question,

and indicate, as the learned judge thought they indicated, when they stand by themselves, the intention of the testator that the legacy, so far as not paid out of the share of the testator in the partnership, should be paid out of his general estate.

A
GREENE, L.J. : I agree. Mr. Harman said, and said rightly that cl. 5 must be construed as a whole. He also said that it was misleading to treat cl. 5 as though it were a clause in which the opening words fell, in the first instance, to be construed, and then the proviso referred to in the order, to see what effect it had upon them. That last contention would not, I think, even if taken at its full value, carry Mr. Harman to the conclusion which he desires, but, speaking for myself, I do not think it is a right contention. It is perfectly true that the clause must be read as a whole, but that does not mean that the structure which the testator had adopted in his sentence is to be disregarded. In the present case, the structure which the testator has adopted is of this character ; first of all, words of clear gift of a sum of £3,000, secondly, a direction as to the payment of that sum out of his share in the partnership, and, thirdly, a proviso which will operate, and operate only, in so far as payment falls to be made out of the share of the partnership. Now, it is, in my judgment, right to give to that structure of the sentence the obvious weight that it should have in reading it as a piece of English. It is in no way a violation of the rule that the clause must be read as a whole to do that, and, in fact, it is common in the construction of wills to apply the principle which I have ventured to indicate. B C D E

In the present case, with all respect to the learned judge, I do not find in the directions contained in the proviso any inconsistency with what goes before, if what goes before is construed as giving a demonstrative legacy. A useful test, I think, may be applied by inserting in the direction for payment the word "primarily," which is in effect what a demonstrative legacy means ; and, if the words be read "to be paid to him primarily out of the share of my capital and loans in the business," the result will not raise any inconsistency with the proviso. The effect will be that, in so far as the business is called upon to provide this money, the proviso will operate, and, in so far as it is not called upon to provide this money, the proviso will have no operation. In my opinion, on the reading of cl. 5 as a whole, the result is that this legacy is a demonstrative one. F G

Appeal allowed.

Solicitors : *Peacock & Goddard*, agents for *Shakespeare & Vernon*, H Birmingham (for the appellant) ; *Gregory, Rowcliffe & Co.*, agents for *Blandy & Blandy*, Reading (for the respondents).

[Reported by C. M. YOUNG, Barrister-at-Law.]

**SIR EDWARD C. BOWEN v. INLAND REVENUE
COMMISSIONERS.**

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
February 3, 4, 1937.]

A

Income Tax—Sur-tax—Deduction—Annuity—Deficiency of income from fund appropriated—Made up by advance charged on residue—Income Tax Act, 1918 (c. 40), s. 27 (1) (b).

B

By his will the respondent's father directed that the residue of his estate should be charged with an annuity to the respondent's mother and subject thereto should be held for the respondent and his brother equally. The executors appropriated certain investments as an annuity fund for the purpose of paying the annuity, and they retained other securities for the residuary fund. At the request of the respondent and his brother the investments representing the residuary fund were not divided between them. The commissioners held this to be an assent by the executors to the residuary bequest taking effect. In 1931 the income of the annuity fund was insufficient to pay the annuity. The income of the residuary fund was added, but the income still being insufficient, an overdraft was obtained, secured by the investments representing the residuary fund. The respondent sought to deduct as an annual payment for sur-tax purposes his share of the amounts borrowed to make up the deficiency in the annuity:—

C

D

HELD: the appropriation of the annuity fund and the assent did not release the residuary fund from the liability to make up any deficiency in the annuity. There was, therefore, no personal liability upon the respondent to make any payment in respect of the annuity to bring the case within the Income Tax Act, 1918, s. 27 (1) (b), and the payments made were not made out of property belonging to the respondent, since under the will the annuitant had a right of recourse to the residuary fund. The deductions could not, therefore, be properly made.

E

F

[EDITORIAL NOTE. The basis of the decision here is that the annuitant has in law an undisputed right to recover any deficiency from the residuary estate so long as it remains intact, and by way of following the property after it has been vested in the residuary legatees. In so far as there has been or will be a deficiency, the residuary and in fact belongs to the annuitant and not to the residuary legatees; and therefore the payment of the deficiency was not a payment by the residuary legatee at all. There could then be no question of the deduction of such payments as annual payments made out of his income.

FOR DEDUCTIONS IN COMPUTING TOTAL INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 275, 276, para. 546; and FOR CASES, see DIGEST, Vol. 28, pp. 111, 112, Nos. 683-689.]

G

Cases referred to:

- (1) *Re Evans & Bettell's Contract*, [1910] 2 Ch. 438; 23 Digest 431, 5022.
- (2) *Re Parry, Scott v. Leak* (1889), 42 Ch. D. 570; 23 Digest 400, 4713.
- (3) *Carmichael v. Gee* (1880), 5 App. Cas. 588; 23 Digest 423, 4936.
- (4) *Howe (Earl) v. Inland Revenue Comrs.*, [1918] 2 K.B. 584; on app. [1919] 2 K.B. 336; 42 Digest 671, 816.

H

APPEAL by the commissioners of inland revenue from a judgment of LAWRENCE, J., reported in [1936] 1 All E.R. 957, allowing an appeal of the taxpayer from a decision of the special commissioners.

The respondent taxpayer's father died on Sept. 19, 1924, and by his will gave an annuity, free of income tax, to his widow, and certain settled legacies, the residue to be held in trust for his two sons in equal shares. An "annuity fund" was set aside by the trustees (not under any provision of the will) to answer the widow's annuity, and, after all the other provisions of the will had been satisfied, the executors retained a balance of investments to the value of £58,000, which was called the "residuary fund." In 1928, the respondent and his brother wrote formally to the trustees, requesting them to retain these investments instead of dividing them and handing them over. This was done, and each of the brothers received the income from his share until 1931. In that year, owing to the depression, the annuity fund was found to be insufficient to pay the widow's annuity and tax, and the trustees thereupon used the residuary fund as well, but the two funds together proving inadequate, they found the balance by borrowing from the bank upon the security of the residuary fund. They adopted this method to avoid selling shares at an abnormally low price. After 1931, the annuity fund and the residuary fund were merged in the trustees' accounts, and the debit balance of the income account of this fund was left in the accounts, so that the trustees could see the amount of the total debit items which would, in their view, have primarily to be set against the residuary capital. The debit balance would accumulate until it amounted to the capital of the residuary fund. The trustees took the view that, until the overdraft had reached the amount of the residuary fund, they could not encroach on the capital of the annuity fund. As the respondent and his brother were the sole residuary legatees, the charging of the deficiency of the annuity income against either the residuary fund or the annuity fund would have had the effect of depleting the amount of capital that would come to them upon their mother's death.

For the sur-tax years 1931/32 and 1932/33 the respondent returned, and was charged in respect of the estate only upon, the income of the fund set aside to answer his settled legacy, which had been credited to his drawing account with the trustees. Nothing was returned by him, or included in his assessments, in respect of the residuary fund. His drawings on the income of his settled legacy were not in any way restricted, and the only deduction made in his drawing account to meet the annuity fund deficiency was a sum of £178 for the year ending Sept., 1931, being half the deficiency for that year.

The respondent appealed to the special commissioners to allow him to show two sums of £1,076 and £1,198 respectively, his share of the deficiency made up by borrowing from the bank, as legitimate deductions from his total income.

The special commissioners decided that on Nov. 12, 1928, when at

the brothers' request the executors retained the investments, they assented to the residuary bequests. The steps which the trustees had taken in making up the annuity had not reduced the respondent's income, and there was no error in his returns, and no proper claim to relief.

A LAWRENCE, J., allowed the respondent's appeal, and the commissioners appealed.

The Attorney-General (Sir Donald Somervell, K.C.), J. H. Stamp, and Reginald P. Hills for the appellants.

B *J. Millard Tucker, K.C., and Cyril King* for the respondent taxpayer.

The Attorney-General: If the residuary bequests had not taken effect, the annuity could have been charged on the whole of the corpus (outside the settled legacies) without the consent of the respondent. Whether or not there was an assent by the residuary legatees or the widow to the setting apart of the residuary investments to answer her annuity, the appellant cannot say that it constitutes a charge on his income. It is a series of borrowings against a fund in which he will ultimately have an interest. He cannot set off, as annual sums charged against his income, payments properly made out of that fund before his interest accrues. Even if the widow did assent, the setting apart of the residuary investments was not done under the will, and the widow would retain her right to have the income and the corpus of the whole fund at her disposal, unless she waived it. It was to the respondent's advantage that the trustees should borrow from the bank, rather than sell any of the investments, and this fact does not prevent the payments from being voluntary. As the will makes an absolute gift of the annuity, there is a charge on the corpus of the estate if the annuity investments are not adequate. The burden of the payments will not ultimately fall upon the respondent and his brother. Residuary legatees receive only what is left after the rights of annuitants and specific legatees are satisfied. There is no evidence of a conveyance, to the residuary legatees, of funds which became theirs absolutely, or that there was a contract by the brothers to make up the deficiency.

Stamp, following for the Crown: The respondent is seeking to charge upon, and deduct from, his income outside the will sums which by no possibility could have been enforced against that income. The residuary legatees were in no way liable for the annuity payments, which were paid and payable only out of the assets governed by the trusts of the will. The respondent cannot claim that they are chargeable upon and deductible from his income. If the residuary legatees had had the residuary securities handed over to them in 1928, the trustees would have appropriated a fund to answer the annuity, under the Administration of Estates Act, 1925, and the annuity would still have remained charged on the corpus when the income proved insufficient. If, then, the brothers

had brought back the fund, and told the trustees to use it, as if it had never been handed over to them, the annuity would then have been thrown on to the income, and, possibly, on to the corpus. None of the annuity, however, would have been thrown on to the income of the brothers—only on to the fund which they would have put into the trustees' hands to be treated as an accretion to the trust estate. This actual case is much stronger, for the trustees retained the residuary fund in 1928, and, in 1931, were quite right to recall the assent they had given.

Tucker, K.C. : The payments came out of the property of the appellant. To entitle a taxpayer to deduct an annual payment from his total income, that payment need not diminish his income from other sources. The words of sect. 27 should not be given the strict interpretation for which the Crown contends, for then any payment made in fulfilment of a personal obligation under a contract would be excluded. *Howe (Earl) v. Inland Revenue Commissioners* (4) shows that a payment from which tax can be deducted can be treated as a deduction in arriving at the sur-taxable income. In this case the respondent and his brother were absolutely entitled to the residue of the property, subject to a charge in favour of their mother in respect of her annuity. Alternatively, even if that fund was not legally liable to suffer the deduction from it of the amount necessary to make up the deficiency in the annuity, the respondent had made himself contractually liable to pay that amount. Sufficient facts are stated in the case to enable the court to infer a contract that, in consideration of the trustees and/or the annuitant refraining from selling any of the securities which had been primarily set aside to answer the annuity, the brothers would pay the deficiency in the annuity out of their own pockets. They did so by borrowing from the bank on the security of their own £58,000 worth of investments. Although the overdraft was granted on the account of the trustees, these were bare trustees for the respondent of his half-share of the investments, which alone were charged with the overdraft. The court may also properly infer that the trustees were borrowing as agents for the appellant, and could look to him to recoup them for any loss they suffered through their liability to the bank.

The court did not call upon the Crown to reply.

LORD WRIGHT, M.R. : This is an appeal from a judgment of LAWRENCE, J., who arrived at a conclusion differing from that of the special commissioners. With great respect to the learned judge, I find it impossible to agree with the conclusion at which he arrived, and I think that in the result the decision of the commissioners was right.

The question arises out of the will of the testator, Sir Albert Edward

Bowen, and the question to be ascertained is whether the respondent in this court is entitled to have remission on his assessments to sur-tax for the income tax years 1931/1932 and 1932/1933. He is claiming that remission on the ground that the assessment was excessive, by reason
 A of some error or mistake in the return or statement made by him. As far as I can see, if he had shown any such error or mistake, he would have been entitled to the relief which he claims. He claims that assessments for these two years were respectively erroneous, or excessive, to the extent of £1,076 in the former year, and £1,198 in the latter year.
 B He claims that these particular sums he was entitled to deduct from his total income under sect. 27 (1) (b) of the Act of 1918 which deals with :

any yearly interest or other annual payments, reserved or charged [on his income] whereby his income is or may be diminished.

C I have been unable to find any basis upon which it can be said that his income has been diminished by either of these sums. The learned judge, in part of his judgment, or in part of his reasons, seems to have proceeded on the ground that there was a contract under which these sums were paid. I need not discuss that any further. I merely mention
 D it in order to say that there is no finding that the respondent here paid these moneys, if he paid them at all, under any contract, and there is no evidence which would support any such finding of fact ; indeed, in this particular case, in this court, I do not think that the point has been stressed, or even taken at all. It is said, however, that these moneys
 E were paid in the way in which they were paid—I shall describe that in a moment—by the respondent here, because he was under a personal liability to discharge these sums of money, and, although, in fact, they were discharged by borrowings from a bank on certain property of his, still, these payments made in that way, in discharge of his personal
 F liability, were payments which came to him as under sect. 27 (1) (b). I need not examine the correctness of that contention, so far as it seeks to bring, on any view, these payments within the section, because I cannot accept the argument of Mr. Tucker and Mr. King that there was any personal liability, of any sort or kind, resting on the respondent
 G here to make these payments. In order to justify that conclusion, it is necessary to look at the will, and to some extent at the facts of the case, as found by the commissioners. The testator appointed executors, including his wife and his elder son, the present respondent, and he appointed them to be “ executrix, executors, and trustees ” of the will.
 H He was a gentleman of considerable wealth, and the will is a complicated document, but there are not many provisions in it to which I need refer. First of all, by cl. 6, he gave to his wife :

a legacy of £5,000 free of duty to be paid to her as soon as conveniently may be after my decease and an annuity of £4,000 free of income tax.

That is an absolute gift of the annuity, and, as will appear in a moment, there is no appropriation of any specific fund, or any power to appropriate any specific fund, to satisfy that annuity. It is not an annuity which is to be paid out of a particular fund, and which is to diminish if the fund so nominated becomes insufficient. That that is so is confirmed by A
cl. 17 of the will. Before I go to cl. 17, I must refer to cl. 16, which contains a trust for sale, and requires the trustees to make provision for the payment of any annuities bequeathed, and the duties on any legacies or annuities bequeathed free of duty, by the will, and to invest B
the residue in the names of the trustees in authorised investments. Then cl. 17 deals with the annuity of £4,000. It says :

My trustees shall out of the income of the said trust premises constituting or representing and hereafter referred to as my residuary estate pay to my said wife during her life the before-mentioned annuity or clear yearly sum of £4,000—

without deduction of tax. Then the will goes on to settle three legacies C
on the three daughters severally, who are named. These are referred to as "the settled legacies" set aside out of the testator's residuary estate, and, for that purpose, the testator sets aside three sums of £30,000 each. Then there are two further settled legacies dealt with. One D
is a direction to the trustees to set aside out of the residuary estate the sum of £100,000 upon trust to pay the income to the elder son—that is, the present respondent—during his life, with various other directions which are not here material. There is a similar provision as regards the sum of £60,000 to be set aside out of the residuary estate on trust to pay the income to the second son during his life, and then E
there are further dispositions to take effect in various contingencies. None of these matters is here material. In cls. 31 and 32, there are two further directions, to take effect upon the decease of his wife. The trustees were directed to set aside out of the residuary estate a further F
sum of £50,000, to be added to the trusts for the benefit of the elder son, and then there is a similar provision of £40,000 for the benefit of the second son. Finally, for this purpose, there is a provision that the residue of his estate is to be held in trust for the two sons in equal shares absolutely. As I have said, that is a bequest of the annuity. No question arises as to the three settled legacies settled on the daughters, G
or as to the two settled legacies settled on the sons. The residuary estate in question in these proceedings is taken to be what is left after providing for the settled legacies, and, of course, for the specific legacies, the expenses, and so forth. Apart from what happened afterwards, H
there could be no question at all, I should imagine, that the widow was entitled to be paid her annuity, and that, for that purpose, the income of the whole of the residuary estate was to be available to pay that annuity, and, if that income proved to be insufficient, then recourse was to be had by the trustees to the corpus of the residuary estate,

so far as might be necessary or proper. That being so, the sons had no absolute right at all in the residuary estate, until the death of the widow. Until that happened, the residuary estate was subject to a trust for the payment of the annuity to the widow, in the way which

A I have indicated.

No question could have arisen further in these proceedings if it had not been for certain events which took place in 1928. At that time, in 1928, as the case finds, the executors had possession of all the testator's property; they had paid all the debts, and they were in possession of the residue. They had very properly, for the convenience of administration, set aside a certain quantity of investments to answer the widow's annuity and the settled legacies to the respondent and his brother and sisters, but, when they had done that, there remained in their hands a balance of investments to the value of £58,000. That balance was part of the residuary estate, and it was subject, like the remainder of the residuary estate, to the trusts to provide for the annuity to the widow. On the other hand, it was thought to be convenient then to deal with it separately, and what was done, under a request from the two sons, which was dated Nov. 12, 1928, was to put the stocks, which represented that sum of £58,000, in the names of the trustees as individuals. That was decided upon as an alternative to dividing the stocks representing that figure between the two sons. It turned out, however, that the anticipation that what had been set aside to answer the widow's annuity to realise a sufficient income for that purpose was ill-founded, and, in 1931, in circumstances which are familiar to all of us, it was found that the income was insufficient, and the trustees thereupon used both the fund which had been set aside to answer the annuity, and also the fund of £58,000, which has been called the residuary fund. They combined the two funds, and used the income from them to pay the annuity, but even that was insufficient to meet the widow's annuity, and the trustees thereupon—instead of doing as they might have done, realised a sufficient part of the corpus of the residue, which I am using as including both the annuity fund and the residuary fund—borrowed money on the security of the residuary fund to such an extent as was necessary to make up the deficiency on the income. That was a legitimate and proper course to adopt, and it was what they were bound to do, because the transaction in 1928, which vested this block of securities, the £58,000, which put them into the names of the executors and which the executors consented to hold as individuals and on behalf of the two sons, did not change the status or position of these securities. They remained in that state of things, in exactly the same position as that in which they would have remained, so far as the trusts of the will were concerned, if they had not been segregated or registered in this way at all. They were subject to the trusts of the will, that is to say,

their income was available to pay the widow's annuity, so far as might be required, and the corpus was subject to be dealt with in order to make up any deficiency. In those circumstances, I cannot see any ground at all for arriving at any other conclusion.

The court has been referred to various cases, but it is quite clear A from those cases that, even if the executors had gone to the court for the sanction of the court to segregate these particular funds and transfer them to the two sons individually, and the court had sanctioned that, that still would not have effected the release of that part of the estate from the trusts of the will in favour of the widow. I will refer to one B case only, the case of *Re Evans and Bettell's Contract* (1). At p. 442, PARKER, J., as he then was, refers to the earlier cases, which I need not cite again, and says :

When an annuity is charged on the income of residuary real and personal estate, and the personal estate is amply sufficient to provide for all the rights of the annuitants, the court, in the exercise of its administration jurisdiction, sets aside C a fund and distributes the rest of the estate. But, as NORTH, J., points out in *Re Parry, Scott v. Leak* (2), that exercise of jurisdiction does not release the rest of the estate; and if the fund fails, owing to unforeseen circumstances, to answer the annuity, the annuitant may follow the rest of the property into the hands of those entitled to it, since it is still subject to the annuity—

and then he applies that. That is a case where the sanction of the D court has been obtained, and, the sanction of the court being obtained, the executors would not be in any way liable for the separation of a part of the estate, but the position is certainly in no way different, for this purpose, where trustees have not thought fit to obtain the sanction E of the court. The position is exactly the same, and I cannot accept the argument of Mr. Tucker that it is different. His argument is that, if the trustees think fit to pick out part of the estate and transfer it to the residuary beneficiaries, then the beneficiaries become absolutely F entitled to that estate, and hold it free from the trusts of the will, although they remain under a personal liability to contribute as a personal debt whatever is necessary to make up the amount of the annuity. That seems to me to be something for which there is no authority, which is inconsistent with principle, and which is inconsistent with the general G rule. If that is so, then the whole foundation of the claim here fails, and the respondent here is unable to establish any such error as he claims to have established. I need not consider further the various other H points which have been dealt with in an argument which has covered a very wide area. What I have said here appears to me to be sufficient to dispose of the appeal, with the result that it is allowed, with costs here and below.

ROMER, L.J.: I agree. It is plain that the respondent is not entitled to relief in respect of the two sums mentioned in the special

case, unless those sums were paid out of property of his, or were paid in pursuance of a personal contract entered into by him with the trustees or with the annuitant. As far as the personal contract is concerned, LAWRENCE, J., inclined to the view—in fact, I think that he decided—
A that there was such a contract. That point has not been pressed before us, and rightly so, because, with great respect to the learned judge, there is no evidence at all on which anyone could find that a contract had been entered into between the respondent and the trustees or the annuitant that these moneys should be raised on the security of what
B has been called the residuary fund. Therefore, the only point that need be considered is whether the respondent has shown that the sums in question were paid out of his property. He says that they were, because he says that he was entitled to the ultimate residue of the testator's estate, subject only to a charge to secure the annuity, and that,
C when the deficiency in the annuity was paid out of residue, it was paid out of his property. In order to see whether that contention is well-founded, one must have regard to the trusts, declared by the will, of what the testator calls his residuary estate. In reading those trusts, it must be remembered, in the first place, that, in an earlier part of the
D will, the testator had given to his wife this annuity in absolute terms, so that the annuity constituted a charge upon the whole of the testator's residuary estate, and that none the less because, in the trusts of the residuary estate, to which I will now refer, one finds a trust to pay the annuity out of the income of that residuary estate. Authority for the
E proposition that that trust does not diminish a charge of the annuity on the corpus of the whole estate is to be found in the case to which Mr. Tucker called our attention, *Carmichael v. Gee* (3), and there are many other authorities to the same effect.

Bearing that in mind, I will now turn to the trusts of the residuary
F estate. The first one is a trust out of the income to pay to his wife this annuity. The next trust is to set aside out of the residuary estate three separate sums of £30,000 each. The next trust is to set aside a sum of £100,000 and the next trust is to set aside a sum of £60,000. Then there is a trust on the decease of his wife to set aside two further
G sums, and, ultimately, there is a direction :

As to the residue of my estate I direct my trustees to hold the same in trust for my two sons [and he names them, one of them being the respondent in this appeal] in equal shares absolutely.

The sums that were to be set aside—of course, the annuity does not
H take any priority over those sums, but it is *pari passu*—have in due course been set aside, and no question arises in respect of them. It is not suggested that the annuitant can have any right against those sums.

The result of all that is that the trustees were left possessed of a

residuary fund upon trust to pay out of the income in each year to the wife the sum of £4,000 free of income tax and to pay any balance of the income in that year to the two ultimate residuary legatees, but, in the event of there being a deficiency in income—that is to say, deficient income to pay the annuity—the trust is to provide the deficiency out of the corpus of the residuary estate, and it is only subject to those trusts that the ultimate gift of capital in favour of the sons takes effect. A

The trustees might, with the consent of the widow, if they all thought fit, have set aside and appropriated a fund to meet the annuity. Had they done so, the ultimate residue would have been freed from the payment of the annuity. If the fund set aside increased in value so that the income exceeded the £4,000 free of tax, the widow in that case would have benefited by it. If, on the other hand, the fund had diminished in value, so that it was no longer capable of providing the £4,000 a year free of tax, the widow would have had to suffer a loss, except in so far as the capital of the fund was capable of making good the loss. She would be entitled to resort to the capital, but the ultimate residue would have been freed, and could have been handed over to the two sons. It is agreed that no such appropriation took place. There has been no appropriation made with the consent of the widow, and I understand that no such consent was given for a very obvious reason, because she does not want to lose her charge on the ultimate residue to make good her annuity. Whether that is the reason or not, she does not admit that her consent was given to the appropriation. It has not been suggested in the case, and it has not been suggested by Mr. Tucker. That being so, the attempted appropriation by the trustees of a sum to represent the ultimate residue had no effect whatsoever upon the rights of the annuitant, nor upon the rights of the residuary legatees. Notwithstanding that attempted appropriation, a fund remained still subject to the trusts of residue that I have endeavoured to describe. B C D E F

The position, therefore, as it seems to me, is analogous to this: A testator leaves an income-bearing fund upon trust out of the income to pay, say, £500 a year to A., and upon trust to pay the balance of the income and ultimately the corpus of the fund to B. That £500 a year is not paid out of the property of B. at all. He is entitled to no part of the income-bearing fund, except what is left after making good the £500 a year. G

Applying that illustration to the present case, when these two sums in question were paid for the purpose of making good the deficiency in the annuity, they were not paid out of the respondent's property. They were paid out of the property given by the will to the annuitant herself. H

That being so, it appears to me that this appeal must succeed, with the consequences that LORD WRIGHT, M.R., has mentioned.

GREENE, L.J. : I agree.

A Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Bischoff, Cox, Bischoff & Thompson* (for the respondent).

[Reported by DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

B

FRYER v. SALFORD CORPORATION.

[COURT OF APPEAL (Slesser and Scott, L.JJ., and Farwell, J.),
January 25, 26, 1937.]

C

Education—Local education authority—Negligence—Children—Cooking class—Gas cooker—No guard.

The plaintiff, a child aged 11, attended a school maintained by the defendant authority. Whilst she was being instructed in cooking, her apron caught fire from a gas-cooker, and she received injuries. There was no guard round the cooker :—

D

HELD : the danger was one which ought reasonably to have been anticipated, and one which a local authority ought to have taken precautions to prevent by the provision of a guard round the stove or otherwise.

E

[EDITORIAL NOTE. It has been the practice of education authorities for many years to provide gas stoves for the purposes of cookery instruction. It does not seem to have been the practice to guard such stoves so that children's clothing should not catch fire by coming into contact with the gas flame. It is, however, held in this case that the failure to provide such a guard is negligence on the part of the local education authority for which it may be held liable.

F

AS TO LIABILITY OF LOCAL EDUCATION AUTHORITIES FOR ACCIDENTS, see HALSBURY, Hailsham Edn., Vol. 12, p. 41, para. 86 ; AND FOR CASES, see DIGEST, Vol. 19, pp. 556, 557, Nos. 17-24.]

Cases referred to :

- (1) *Fardon v. Harcourt-Rivington* (1932), 146 L.T. 391 ; Digest Supp.
- (2) *Readhead v. Midland Ry. Co.* (1869), L.R. 4 Q.B. 379 ; 30 Digest 205, 748.
- (3) *Vancouver General Hospital v. McDaniel* (1934), 152 L.T. 56 ; Digest Supp.
- (4) *Jones v. London County Council* (1932), 96 J.P. 371 ; Digest Supp.
- (5) *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205 ; Digest Supp.

G

APPEAL from a judgment of SWIFT, J., at the Manchester Assizes, dated Mar. 4, 1936. The facts are fully stated in the judgments.

H

G. J. Lynskey, K.C., and *Denis Gerrard* for the appellant authority.

E. W. Cave, K.C., and *E. Rowson* for the respondent.

J. C. Jolly for Miss Cox, the second defendant below.

Lynskey, K.C. : The education authority was following an approved system ; there was no negligence : *Vancouver General Hospital v.*

McDaniel (3). The fact that this practice had been followed, here and in other schools, for a long time, without any previous accident, is evidence that there was no negligence in not taking special precautions : *Jones v. London County Council* (4). Even if there is a clear possibility of danger, past experience may be taken into account : *Hall v. Brooklands Auto-Racing Club* (5). It is impossible to have a guard while the children are actually cooking on the stove ; would a reasonable person provide a guard when they are not cooking ? [Counsel also referred to *Fardon v. Harcourt-Rivington* (1).]

Cave, K.C., was not called upon.

SLESSER, L.J. : In this case, a little girl named Fryer was seriously injured while attending a class at a domestic training centre in the city of Salford, in a school maintained by the corporation of Salford, under the Education Acts. It is its duty, under the Education Act, 1918, s. 48, to give to children of a certain age practical instruction in cookery. It was in accordance with that statutory power that the instruction was given in the present case, and this little girl, Fryer, was attending the class when she met with her injuries. She is a child of 11—approaching 12—and, for the purpose of this particular instruction in cookery, it is only at the age of 11 that children attend. The mistress, Miss Cox, who was engaged by the corporation of Salford, was, on the day when the accident happened, giving instruction to the little girl and to some 18 other young children of about the age of 11 or 12 years. The particular matter which they were being taught was the very useful science of making a pudding. It appears that the children bring to the class, normally, when these puddings are made, basins ; they also bring a small sum of money, I think in this case 2½*d.*, to cover the material in the puddings, and the puddings are duly cooked, under instruction, and the children are entitled each to take her pudding home with her when they leave the class. The practice is that the pudding is put into a steamer. The steamer is a cylindrical tin, which is put over a gas-fire, the water is allowed to boil, and subsequently to simmer, and then the puddings are duly taken out when they are ready.

On the afternoon in question, the puddings were duly cooked in the usual way. There were two stoves on which the steamers were put, and one was further from the open fire than the other. There seems to have been some difference of opinion as to the exact whereabouts of the lady who was conducting the class at the time when the accident happened. Speaking for myself, I do not know that it is very material. What the learned judge said is this :

Miss Cox proceeded to one of the steamers in order to extract the puddings, and, while she was doing that, the girls left their places and went towards the place where Miss Cox was, expecting her to give them a pudding or call their

number. As their numbers were called, it was the practice for them to go up and receive the pudding appropriate to their particular number.

A As regards this particular girl, Miss Fryer, who was injured, she, it appears, did not go up to the stove at which Miss Cox was, but stood alongside the other stove, the larger one, where a second steamer was boiling and some of the burners of that stove were alight. Again, to quote the learned judge :

B the girl stood beside the gas-table. It is not quite certain what happened, but the evidence of the little girl herself is that her apron caught fire. She says that, after they had been away from the room for some time, while the puddings were being prepared, they came back, and, when they had finished what they call their domestic duties, Miss Cox said : " I will call out all those who have got puddings in the steamer to come and receive them." Then Miss Betty Fryer says she went to the stove [that is, the stove other than that at which Miss Cox then was]. She was holding her apron (and she indicated how she was holding her apron out), and then a girl told her that her pinafore was on fire. She thought she had been standing round the gas-stove for about five minutes before she found that her apron was on fire.

C In those circumstances, it is alleged now that the corporation was negligent in that it failed to have round this stove at which the plaintiff stood any guard or fence, so as to prevent the pinafore, or apron, or any other part of the clothing, getting into the gas flame and catching fire.

D Before SWIFT, J., there was also an allegation of negligence against Miss Cox, the lady who was teaching cookery, but that allegation wholly failed. Therefore, so far as she is concerned, there is here no question on the appeal : there is no cross-appeal in this case. Therefore, the whole question now resolves itself into this, whether the only ground on which

E the learned judge said the corporation was negligent, that is to say, that it was its duty, in the circumstances, to have protected the children from the gas, and that it had failed to protect them by a sufficient guard, can or cannot be supported on the evidence in the case. The learned judge said this :

F The trouble about it, as it seems to me, is that, while people were passing, while children were passing, around this table, in order to go to where Miss Cox was serving out the puddings, they came near to the flaming gas and I think that that flaming gas ought to have been protected ; there should have been a guard, which could so easily be provided . . . it is a simple guard, which our mothers put over the fireplace every day of our lives when we were young, to prevent us tumbling

G into the fire. The education authority, in my view, should have supplied such a guard. I do not think it was right to have 19 or 20 little girls passing close to this burning gas-stove, as they must have passed, in order to get their puddings, full of their childish eagerness and anxiety to get the prize which they were going to take home in exchange for the 2½d. which they had brought, without guarding it.

H In my view, the learned judge was fully entitled, on the evidence in this case, to come to the conclusion which he there states. It must be remembered that a distinction should be drawn, when the question, " What is the duty of a local authority to guard against possible dangers ?" is being considered, between the case where the possibility of danger

emerging is reasonably apparent, in which case there is negligence if no precautions be taken, and the case where :

the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

I quote from a passage of LORD DUNEDIN, in the case of *Fardon v. Harcourt-Rivington* (1) at p. 392. In my view, in the present case, having regard to all its circumstances, this was a case where the danger emerging was reasonably apparent.

Mr. Lynskey has pointed out that the uncontradicted evidence in this case is, first, that no such guards have been placed upon gas-cookers of this kind, used by children, by other education authorities, or by the Salford authority, and, secondly, that no previous case is known of a child being injured in this way, and he draws our attention to a large number of authorities, to the effect that no man may reasonably be called upon to guard against dangers which he ought not reasonably to anticipate. The matter is put very clearly, from that point of view, in the case of *Hall v. Brooklands Auto-Racing Club* (5) ; but really, in my view, it is a principle which goes back very much further, and may be discovered in the well known authority of *Readhead v. Midland Ry. Co.* (2), where it was said, at pp. 384, 385 :

An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing.

In the present case, I do not think that it can be said that what here happened was that which no reasonable person could anticipate, merely because such an accident had not happened before, or because there was no reason to suppose that it would happen. In my view, the very nature of the case is such as to render reasonably apparent the possibility of danger emerging. The situation is this : there is, first, this stove with a naked flame, which may be turned down in order that the water may simmer, but yet a flame which is not in any way guarded ; secondly, young children, who are waiting to take their puddings from this or the other stove, and, although it may be that, as an ideal discipline, they would be expected to remain in their seats, yet, taking the nature of young children 11 years of age, I think there is a very reasonable probability, at any rate when the mistress's back is turned, that they will crowd around these unprotected stoves, in the way in which, in fact, they did crowd around in this particular case. Various words have been used with regard to the temptations which may be set before young children. They have been referred to as allurements, enticements, and traps, and various phrases ; but, whatever phrase you use, I think it is quite clear

- that for young children, witnessing the final transfiguration of their own puddings, it was a distinct allurements, and nothing was more natural than that children should crowd around this stove in order to receive their puddings. In that case, it appears to be clear that the danger which
- A would, or might, arise was, if not self-evident, at any rate a danger which ought reasonably to have been anticipated ; nor can it be said, on the evidence, that the guard which was suggested, to protect these children, was anything which was impossible. It cannot be said here that the local authority, in being called upon to perform its statutory duty of
- B teaching cooking, was doing anything which necessarily required this danger to be incurred of allowing the children to get near the flame. Mr. Cutter, it is true, in an official utterance, on being asked, "Is there any reason why the flame should not be guarded ?" replied : "Well, sir, educational practice does not guard the stoves." That in itself seems
- C to be an insufficient reason for not placing upon them a guard. But he is saying no more than he had said previously, that, in fact, the local authorities have not guarded these stoves. But Miss Margaret Weddell, who was called as a witness by the corporation, and is headmistress of the Training College of Domestic Economy, under the control of the
- D Manchester Education Committee, was quite frank on this matter. When it was suggested to her that something like the old nursery guard, which we used to have round the fire to prevent the baby falling into the fire, might be used, on being asked, "Would there be any trouble in putting one around that ?" she did say : "Well, we would have to
- E stretch across it to reach the stove." She said they had got guards round the open fires in the centres, and that those guards could be taken away when the lessons were finished. She did say that she did not think it would be desirable to put a guard round the gas-stove when the children were cooking, but the reason she gave, as I understand her
- F evidence, was that they would not have such a guard at home, and, therefore, it would not accustom them really to the conditions they would have to face in their own homes. As against that, it may well be said, and no doubt was urged, that the circumstances in which girls do cooking at home are quite different from those in this cookery centre.
- G It may well be—I do not know—that the age of 11 years is a little early for them to manipulate a gas cooker. In their homes, it may be that there would not be the pressure of children round the stove that there would be in the cookery centre. At any rate, this lady does not suggest that it is not feasible for such a guard to be put round these stoves
- H when the actual cooking operations are not proceeding, in the sense that it is necessary continuously to get to the gas itself. While the steamer is simmering, and while there is occasion to use the gas, there appears to have been no adequate reason why these guards should not be put round the stove.

If the learned judge had come to a contrary conclusion, upon a consideration of all the evidence, it may well have been that this court would not have thought fit to disturb his finding, but, having heard all the evidence in this case—I understand he saw the stove, which was an advantage we also had—he came to the conclusion, on the balance of consideration, first, that this was a danger which ought reasonably to have been anticipated, and, secondly, that it was a danger which could reasonably be guarded against. He has, therefore, come to the conclusion that the plaintiff succeeded in establishing a duty towards her, on the part of the local authority, and a failure to perform that duty. For these reasons, I am of opinion that this appeal fails.

SCOTT, L.J. : I agree, and I do not think it is necessary to add anything to the observations on the legal position, which have fallen from SLESSER, L.J. I regard the question which the learned judge had to deal with in this case as essentially one of fact. The principles applicable are quite well known, and there is nothing novel in the circumstances here, so as to raise any difficulties. The first thing, in considering a case of this kind, is, of course, to see what is the measure of the duty of the defendant authority towards the particular plaintiff. There is no question that this child was there in the performance of a statutory obligation ; she was, therefore, in the full position of an invitee : there is no question of a licensee, no question, *a fortiori*, of a trespasser. As she was there as an invitee, the defendant education authority was under a completely unqualified duty to take all reasonable care of her. The second thing is that the measure of care, in such cases as this, varies with the degree and intensity of danger. In this case, the danger was one of fire, and of fire to little girls, many of them wearing cotton clothes, perhaps flimsy and easily inflammable. Add to it this, that, being little girls, they would be less careful than grown-up people, and more easily attracted to the place of danger. The third thing affecting the degree of care that is called for, is that, in the nature of things, the children would be allured towards their puddings when the puddings were ready to be handed out to them. One can picture the keenness of the children, making them run and hurry to the place where they were to receive them, in so far as it was possible for them to do so. Those were circumstances making it likely that the children would go close to the stove.

Under the system of giving instruction in this class, there were, as my Lord has pointed out, two separate stoves, very near to each other, the distance between them being only 3ft., and, the whole room being comparatively small, the practice was for the teacher, Miss Cox, to call out the identifying numbers which were on the puddings, as she took them out of one of the steamers, the number being that child's own num-

ber, known to the child, and serving as a summons to the child to come up to receive her pudding. We gather from the evidence that the total number of puddings that had to be cooked involved the use of two separate steamers, and, therefore, of two separate stoves, in the circumstances of the case. The teacher, Miss Cox, was at the left-hand stove shown in the photograph, and there was a limited number of puddings to come out of that stove. She says there was a line of pupils coming up to her to receive their puddings. Some had been handed out and taken back by the pupils to do what was necessary with the puddings at the table. Whilst she was dealing with the puddings there, at the left-hand stove, her story is that she heard a cry of alarm, and saw that the plaintiff was on fire. It is clear, from the evidence taken as a whole, that the little plaintiff had gone to the other cooker from which her pudding eventually was to come. I think, on the facts, the learned judge was fully entitled to come to the conclusion that she was there prematurely; but in the circumstances of the case, with only one teacher to look after a class of, say, 19 or 20 girls, it was inevitable that the girls would run to the second stove in anticipation of the teacher getting there, and that was just what happened here. It was in that very fact, that the girls were sure to do it, that there was an element of grave risk, which, as the case proves, was not guarded against. The learned judge took the view that the risk of the children catching fire in that way (during the short space of time when not completely supervised) was so great as to call for the presence of a guard. No evidence was given as to what kind of guard could be put there, but I venture to take judicial notice of facts which are, to my mind, perfectly plain. One has only to look at the photograph and at the plan to see that an open wire-netting guard could have been fitted very easily at each end of the stove, and, similarly, along the front of the stove, three separate guards hanging on hooks, which would be removable at will. It was suggested that to have a guard there would have interfered with certain cooking lessons, for instance, the making of sauce, that it would have been in the way. Let us assume that is so; there was no difficulty in having a guard that could be removed whenever it was necessary to remove it; and I can see no reason why a detachable guard should not be present. Had there been such a guard here, apparently, on the learned judge's view, it would have been impossible for the little girl's clothes to catch alight, because she would have been prevented from stretching her little apron forwards so as to come in contact with the flame. She said in her evidence that, at the moment when she held her apron out, she was looking at the teacher. The question is:

Whilst you were standing like that did anything happen? (A.)—I do not remember, sir. I was looking at the teacher. (Q.)—Did you find your pinafore was on fire? (A.) A girl told me:

That was a perfectly natural way for the accident to have happened, and a way which would have been impossible had there been a guard there. In those circumstances, having regard to the inevitable allurements for these little girls of the forthcoming puddings, and the impossibility of the teacher at the same time picking out the puddings from the one A stove and also watching to see exactly what the pupils, who had left their chairs, were doing, I think that really the local education authority was in a logical dilemma : either there ought to have been two teachers, or a guard to the stove. There was no suggestion made of two teachers ; the question was not discussed. We reach the position of the finding of B the learned judge, that there ought, as a reasonable precaution, having regard to the ages of the little girls, and the proximity of the flames to their clothes, and the inflammable character of their clothes, to have been a guard ; and that decision, in my view, is a decision of fact, pure and simple, upon which this court should be very slow to disagree with C an experienced judge. I think, therefore, the appeal should be dismissed.

FARWELL, J. : About this case, I have felt considerably more difficulty than the other members of the court. I am not, however, prepared to say there was no evidence upon which the learned judge could have D come to the conclusion he did, and, therefore, I do not dissent from the order which it is proposed should be made.

Appeal dismissed with costs.

Solicitors : *William Charles Crocker*, agents for *Wood, Lord & Co.*, Manchester (for the appellant authority) ; *Gibson & Weldon*, agents for E *John Whittle, Robinson & Bailey*, Manchester (for the respondents) ; *F. G. Floyd* (for Miss Cox).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

HOPE v. GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Lord Wright, M.R., Slesser, Romer, Greene and Scott, L.J.J.), **February 8, 1937.**]

A *Practice—Trial by jury—Special jury—Right to—Discretion of court—Extent—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 6—R.S.C., Ord. 36, r. 1.*

It was contended that in an action in the King's Bench Division trial by jury can only be ordered when the party applying shows some special cause or reason why a jury should be ordered:—

B **HELD :** under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6, there is a completely untrammelled discretion left to the court or a judge to be applied to the circumstances and the facts of the particular case in which the application is made.

C **[EDITORIAL NOTE.]** It had been thought that certain words that fell from the late LORD HANWORTH in *Keeling v. Cook* (1) restricted the discretion of the court when asked to make an order that a trial should be heard with a jury. To make this matter certain, a full Court of Appeal sat to consider it and decided that the remarks of the late Master of the Rolls had been misunderstood.

D AS TO TRIAL BY JURY, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 172, 173, para. 309; AND FOR CASES, see DIGEST, Practice, pp. 539-541, Nos. 2022-2036. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 569-574.]

Cases referred to :

- E**
- (1) *Keeling v. Cook* (1934), 78 L. Jo. 306; Digest Supp.
 - (2) *Kodak, Ltd. v. Alpha Film Corpn., Ltd., Huth (Frederick) & Co. v. Jackson*, [1930] 2 K.B. 340; Digest, Practice, 298, 290.
 - (3) *Ford v. Blurton, Ford v. Sauber* (1922), 38 T.L.R. 801.
 - (4) *Jenkins v. Bushby*, [1891] 1 Ch. 484; Digest, Practice, 536, 1990.
 - (5) *Timson v. Wilson, Fanshawe v. London & Provincial Dairy Co.* (1888), 38 Ch.D. 72; Digest, Practice, 533, 1963.

F APPEAL from an order of LEWIS, J., made on Jan. 12, 1937, dismissing an interlocutory appeal by the railway company against the order of MASTER VALENTINE BALL that the action be tried with a jury.

G The respondent, the plaintiff in the action, an infant, was suing the railway company by her father as next friend for damages for personal injuries suffered by her through slipping twice on the platform at Claverdon railway station and falling the second time beneath a train. Both parties proposed to call expert medical evidence.

H *Hugh Saunders* for the appellant company : The object of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6 (a), (b), was to ensure that the existing right to a jury in those cases was unimpaired. A litigant in one of them, in order to obtain a jury, has to show to the court or a judge that the action falls into a particular category; and the other party may show, if he can, that trial by jury is not appropriate to the action for the reasons which are set out in the statute. It follows that in other actions the party who seeks a jury must show that

the case is one which ought to be tried by jury and which ought therefore to be taken out of the ordinary mode of trial for actions of that class.

LORD WRIGHT, M.R. : The rule does not say so. It says that the decision should be in the discretion of the court or a judge.

Saunders : It is coupled closely to the previous provision, which A states the circumstances in which right to trial by jury exists. The judgment of LORD HANWORTH, M.R., in *Keeling v. Cook* (1) shows that by subsect. (6) the right to a trial by jury no longer exists in the cases which are not contained in provisos (a) and (b), and that, unless some reason is shown why there should be a jury, the discretion will usually B be exercised against having a jury. R.S.C., Ord. 36 places an onus upon the party asking for the jury. Under the old r. 7a, which related to those actions in which the parties had not at common law a right to trial by jury, discretion was left with the judge to order a jury. In *Jenkins v. Bushby* (4), the court held that a party had to show some good reason C why the case should be tried by an unusual mode.

SCOTT, L.J. : The principle applied in *Jenkins'* case (4) was laid down in *Timson v. Wilson* (5) on the basis of the wording of the rules. Should the effect of sect. 6 not be to give an absolute and complete discretion to the court or judge without any onus or bias either way ? D

Saunders : Such a view would lead to great difficulty through the extreme wideness of the discretion it would allow, and consequently the varying exercise of the discretion by different tribunals. Under the Administration of Justice Act, 1925, the discretion was to be directed to the question of convenience of trial. The first part of sect. 6 clearly E indicates the way in which the discretion should be exercised : there is an onus on the party seeking a jury to show that he should have one.

The Juries Act, 1918, and the Administration of Justice Act, 1920, deprived parties of the right to a jury owing to the exigencies of the war years. The Administration of Justice Act, 1925, put the parties F back where they had been before the Act of 1918. The position between 1925 and 1934 was governed by R.S.C., Ord. 36, r. 6, which lays down that a party may, on his application, have a jury. The Act of 1933 can have no helpful effect unless it wholly alters the position, not only in taking away that right but also in laying down that the appropriate method of G trial is *prima facie* without a jury and that a party who wants a jury must show that he is entitled to one.

The discretion was wrongly exercised in the circumstances of this case, because a jury is likely to sympathise unduly with an infant plaintiff suing a great company. Moreover, the present case raises medical issues H more difficult than those of the ordinary personal injury case.

Willes, for the respondent plaintiff, was not called upon.

LORD WRIGHT, M.R. : This is an appeal from an order of LEWIS, J.,

affirming an order of the master, ordering that the action should be tried at Birmingham, with a judge and special jury. Mr. Saunders, who has argued the case very excellently, has put his ground mainly on the question of principle. He has argued that, under the true construction

A of the Act and rules relating to trial by jury, as they now stand, the party applying for a jury has to show some special cause or reason why a jury should be ordered. He has contested the proposition that the question is left at large, to the discretion of the court or a judge, without there being a presumption or a bias in favour of the view that, *prima*

B *facie*, there shall be no jury; and he has contended, in this case, that the exercise of the discretion by the court and the judge should be set aside, and the order for a jury reversed, because, he says, they have not applied the true standard, they have not proceeded on the basis that they ought not to order a jury unless special cause is shown, but have proceeded on the basis that it was a matter for their discretion, and on

C that ground he asks the court to reverse this order. In my judgment, these contentions are not well founded, and, so far as they may have been thought to receive colour from certain observations made by the late LORD HANWORTH, M.R., in *Keeling v. Cook* (1), I think they are

D based on a misapprehension of what the learned judge meant or said. Before I deal in detail with what he said, I should like to consider the exact position under the relevant rules and Act. As the matter stands at present, there are a number of rules in R.S.C., Ord. 36, rr. 1-7, which deal, among other things, with mode of trial. These rules were promul-

E gated by the Rules Committee under the Judicature Act, 1925, s. 99, which provides that :

(1) Rules of court may be made under this Act for the following purposes . . .
(h) for prescribing in what cases trials in the High Court are to be with a jury and in what cases they are to be without a jury.

F It is obvious there that there is no limitation put on the form or the conditions under which these rules are to be made; the Rules Committee has the matter entirely in its power, and it was under those conditions that rr. 1-7 were made.

Going back in the most summary way to the earlier history, before

G 1925, I think I can state it, for this purpose, very clearly and compendiously by a reference to the case of *Kodak, Ltd. v. Alpha Film Corpn., Ltd., Huth (Frederick) & Co. v. Jackson* (2), at p. 354, where GREER, L.J., dealt with a question of whether the rules now under consideration were *ultra vires*. He quotes, at p. 354, from *Ford v. Blurton* (3). He says :

H In *Ford v. Blurton* (3) BANKES, L.J., points out that until the year 1854 it was the undoubted right of every litigant in the common law courts to have his case tried by a jury. This right was not restricted by the Common Law Procedure Act, 1854, except in cases of account. That Act also made provision for trial without a jury by consent of the parties. A radical change was made by the Judicature Act, 1873. For the first time power was conferred on the King in Council to legislate on the question what cases should be tried by a judge alone and what cases should

be tried by judge and jury, by rules of court for regulating any matters relating to practice and procedure : see 36 & 37 Vic., c. 66, s. 68. As soon as the Act came into force, the rules contained in the schedule were to operate until they were altered by a majority of the judges of the Supreme Court of whom the Lord Chancellor was to be one. The rules had to be laid before parliament and might be annulled.

Then I can pass over a little, and, on p. 355, GREER, L.J., proceeds :

Ord. 36, r. 7 (a), which was the rule in operation from 1883 onwards, preserved the right to trials by jury except in certain specified cases.

Then GREER, L.J., summarises it, and, at p. 355 (the intervening history being the last-mentioned Act and the Act of 1925), he says :

In consequence of the War it became increasingly difficult to find juries for the trial of common law cases, and in July, 1918, an Act of Parliament was passed providing that trial should be by judge alone, except in cases where fraud was alleged, cases of libel, slander, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, and in cases where it appeared to the court that any question or issue was more fit to be tried with a jury than without a jury. The Administration of Justice Act, 1920, s. 2, again altered the law, by enacting that the court or a judge should have power, on the application of either party, to order trial without a jury, if he thought that the case could not be as conveniently tried with a jury as without a jury, but this was not to apply to the cases involving reputation, which were enumerated in proviso (a). This statute had the effect of depriving the parties of a right to a jury in all cases except those mentioned in the proviso and leaving the question of the mode of trial in all other cases to the discretion of the judge in chambers. The Act received a good deal of criticism, and in 1925 it was decided by Parliament that the state of the law as it existed before 1918 should be restored.

That was done, the learned judge adds, by the Administration of Justice Act, 1925.

In *Ford v. Blurton* (3), at p. 802, BANKES, L.J., in reference to these changes, makes this observation :

What was once an undoubted right and in the opinion of many persons (myself included) a most valuable right, has been gradually eaten into, until at last, if the recently issued provisional rule is to be made permanent, it has been entirely taken away. It is in the hope that on further consideration of the matter the right may be restored and the necessary limitation upon the right clearly defined, that I am calling attention shortly to the steps by which the present position has been brought about.

That was the view of the very experienced Lord Justice, and it was in consequence of that and other similar expressions of opinion that the Act of 1925 amended the law, and gave the Rules Committee the full jurisdiction which it now has, subject, of course, to any legislation ; and the legislation in question on which this issue turns is sect. 6 of the Act of 1933. I will read the section, and then come back to the rules. The section provides that :

if, on the application of any party to an action to be tried in the King's Bench Division of the High Court made not later than such time before the trial as may be limited by rules of court, the court or a judge is satisfied that (a) a charge of fraud against that party ; or (b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, is in issue, the action shall be ordered to be tried with a jury unless the court or judge is of opinion that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be

made with a jury ; but, save as aforesaid, any action to be tried in that division may, in the discretion of the court or a judge, be ordered to be tried either with or without a jury.

A Now, on the face of it, that section is putting the matter completely within the discretion of the court or a judge, without any such qualification as you had in the Act of 1925, namely, on the question of convenience. The matter is put as one of discretion, and a discretion such as that described by KAY, L.J., in *Jenkins v. Bushby* (4), where he says this at p. 495 :

B Of course, in a question of discretion, authorities are not of much value. No two cases are exactly alike, and even if they were, the court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

C These final words seem to me to be most significant. That is the effect of the Act, which, therefore, is the overriding provision for this purpose. The matter is left to the discretion of the court or a judge, who, with their experience, and their knowledge of procedure and of the nature of cases and the questions which are likely to arise, and the evidence which is likely to be given, and also, in view of the background of the whole of
D the history of the courts in relation to trials, with or without a jury, in common law actions, are to apply their completely untrammelled discretion to the circumstances and the facts of a particular case.

E Now I cannot simply leave the matter there : it is necessary to look back at the rules, because, under the Act of 1933, the rules then existing (rules which were made under the Judicature Act, 1925) were not rewritten in any way at all : what was done was simply to add to R.S.C., Ord. 36, r. 1, this proviso :

F Provided that this rule and rr. 1A, 2, 3, 4, 5, 6 and 7 of this order shall have effect subject to the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

That, therefore, introduces this section of the Act as an overriding provision. The rules to which I ought to refer now are these. Rule 2 says that unless, under the provisions of r. 6, a trial with a jury is ordered, the mode of trial shall be by a judge without a jury : and then there is a
G further provision as to assessors. Then we have r. 3, which says that causes or matters assigned by the Act to the Chancery Division shall be tried by a judge without a jury, which is the normal case. Rule 4 deals with the position of cases which, before the Judicature Act, 1873, could, without any consent of parties, have been tried without a jury. Rule 5 is
H a rule which gives the court or a judge a discretion ; they :

may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury.

That is to be read now with the discretion, otherwise unlimited, which I have shown is given by the Administration of Justice Act, 1933, s. 6. Then there is r. 6, which undoubtedly has been qualified by the new section of the new Act, but it states the general rule that :

in any cause, matter, or issue other than those mentioned in rr. 3, 4 and 5 of this order, upon the application . . . of any party [for a jury] an order shall be made for a trial with a jury.

It is that rule which is principally qualified by sect. 6 of the Act of 1933. But both as a matter of history and of what is to be found in the rules existing in 1933, I cannot find any justification at all for putting any limitation on the clear words (as I regard them) of the section, which leaves the matter completely in the discretion of the court or a judge, and a discretion which now is qualified only by the specific discretion under r. 5.

For all these reasons, I think that, if the learned judge or the master had proceeded on the assumption that it was necessary to show a special cause to justify him in making an order, he would have been guilty of an error in law in doing so. He did not do so ; he exercised his discretion.

I will say only these few words on the judgment of the late LORD HANWORTH, M.R., in the case of *Keeling v. Cook* (1). It seems to me that the language there used has been completely misapprehended. I do not think that the late LORD HANWORTH, M.R., was intending to lay down any particular construction on sect. 6. He says in terms that he is not deciding any question. He says at p. 307 :

Though it is not necessary to decide the point in this case, I think that means, inasmuch as the statute is condescending to the particular, that the general practice would be that unless some reason is shown why there ought to be a jury, the discretion would usually be exercised against having a jury. It is unnecessary to determine that in this case.

I do not gather from that any decision as to the true construction of the statute ; I think that the late LORD HANWORTH, M.R., was merely expressing an opinion with reference to the particular case before him. He may have been going on to say that in such cases such a discretion, in his opinion, would usually be exercised against having a jury. I do not quite know precisely what effect is to be given to that, because it is perfectly clear that, if a discretion is given in the terms in which it is given under the section of the Act in question, it is meant to be a discretion in the true sense of the term, to be used by the court or a judge, having regard to all the circumstances of the case, judicially exercised. It would be impossible to say that he ought to exercise it "usually" in one direction or the other. But I do not think that the late LORD HANWORTH, M.R., was intending to lay down any such general

rule, and I think that the effect of what he said has been misapprehended.

The result is that the appeal will be dismissed, with costs.

SLESSER, L.J.: I agree, and have nothing to add.

A ROMER, L.J.: I agree.

GREENE, L.J.: I agree.

SCOTT, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *A. G. Hubbard* (for the appellant company); *Ward,*

B *Bowie & Co.* (for the respondent).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

C CAHILL v. LONDON CO-OPERATIVE SOCIETY LIMITED.

[CHANCERY DIVISION (Luxmoore, J.), **January 25, 26, 1937.**]

Industrial Society—Rules—Validity—Allocation of part of profits to political fund—Industrial and Provident Societies Act, 1893 (c. 39), s. 10 (6).

D The defendant society was registered under the Industrial and Provident Societies Act, 1893. The objects of the society set out in the rules included "in all ways to further the establishment of the co-operative commonwealth." The rules provided that 5 per cent. of the net profits of the society should be allocated to an education and political fund, and there was a provision dealing with the constitution of the education and political committee, which was to administer the fund, the number of members of the committee, and its division into an education section and a political section of equal numbers. The amounts allocated to the fund were to be divided into two equal parts, one part being allocated to each section. A member of the society sought a declaration that the society was not entitled to allocate any part of its profits to a political fund for the purpose *inter alia* of disseminating political propaganda or conducting electioneering campaigns in connection with either Parliamentary or municipal elections:—

F HELD: the allocation of one half of 5 per cent. of the society's profits to the political fund and the devotion of that fund to the political activities complained of were neither of them *ultra vires* the society.

[EDITORIAL NOTE. An industrial and provident society can by its rules allow the appropriation of its profits to any purpose provided the purpose is not illegal.

G There must, however, be a rule of the society allowing the particular kind of appropriation to be made. As political appropriations are not illegal purposes, there is no objection to such an appropriation where the rules provide for it.

AS TO APPROPRIATION OF SOCIETY'S PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, p. 484, para. 1044; and FOR CASES, see DIGEST, Vol. 28, p. 119, Nos. 14-16.]

H Cases referred to:

(1) *Warburton v. Huddersfield Industrial Society*, [1892] 1 Q.B. 817; 28 Digest 119, 14.

(2) *Lafferty v. Barrhead Co-operative Society* (1919), 1 S.L.T. 257; Digest Supp.

(3) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; 43 Digest 93, 963.

ACTION for a declaration that the defendant society was not entitled to make grants for any purpose not within the objects permitted by the Industrial and Provident Societies Acts and the Friendly Societies Acts, or to secure representation of co-operative knowledge and opinion in Parliament or upon local administrative bodies.

The plaintiff appeared in person.

R. F. Roxburgh, K.C., H. O. Danckwerts, and Reginald Knight for the defendant society.

LUXMOORE, J. : The plaintiff is a member of the London Co-operative Society, Ltd., and, as such, he sues the society on his own behalf and on behalf of his fellow members for a declaration to put it shortly, that the society is not entitled to allocate any part of the profit earned by it in carrying on its business to a political fund for the purpose, among other things, of organising or disseminating political propaganda, or conducting electioneering campaigns in connection with parliamentary or municipal elections. The declaration is sought on the ground that such an allocation is *ultra vires*. The plaintiff, by his statement of claim raises certain other matters with regard to the validity of a particular amendment of one of the rules of the society, and also with regard to the society's method of convening and holding meetings, but these, I think, were abandoned by the plaintiff at the bar. The only matter to be determined is with regard to the allocation made, out of the profits, by the defendant society to the political society. There is, I think, no dispute of fact, for the society admits that, since the registration of the society, money has been allocated out of net profits to an education and political fund of the society, and that half of the money so allocated—the total being 5 per cent. of the society's net profit—has been applied for political activities of the nature I have already described. The society was registered in the year 1920, under the Industrial and Provident Societies Act, 1893. It has a membership of 530,610 persons, and, on Sept. 1, 1934, its share capital amounted to £6,790,509. I have no copy of the rules which were registered in the first instance under the Industrial and Provident Societies Act, 1893, when the society was registered, but the case has been argued on the footing that the rules which fall to be considered are those contained in the copy of the amended rules registered on Nov. 17, 1934. The rules which appear to need consideration are r. 2, which provides that :

The objects of the society shall be (i) to carry on the business of a storekeeper, general dealer, and universal provider in all its branches, and in particular to buy, sell, manufacture, produce, grow, cultivate, and deal in goods, stores, consumable articles, chattels, and effects of all kinds, both wholesale and retail, and generally, to engage in any business, trade, or industry, which may seem to the society directly or indirectly conducive to the interests or convenience of the society's members, or any section thereof ; (ii) the business of builders, dealers of any description with land, including estate development and estate management, and

the business of insurance against risks of any description connected with the property, and to transact every kind of agency business (including insurance and banking agency ; (iii) in all ways to further the establishment of the co-operative commonwealth.

A The same rule empowers the society to establish a pension or a super-annuation fund for its employees, and confers upon the society full power to do all that is necessary and expedient to accomplish the objects. Rule 29 provides that :

The profits of all business carried on by or on account of the society shall be applied as follows :

B and then follow provisions as to the expenses of management, depreciation, the payment of the interest on shares, and the formation of a reserve fund, and, in sub-cl. 5, there is a direction that :

C 5 per cent. of the net profits shall be allocated to an education and political fund.

Rule 30 deals with the constitution of the education and political committee which is to administer this particular fund. It provides that :

D An education and political fund shall be formed by allocating 5 per cent. of the net profits and such fund shall be administered by a committee consisting of 32 members (two of whom shall be appointed by and from the committee of management), 12 elected to represent the eastern area, 10 elected to represent the northern area, and eight elected to represent the western area, which shall be designated the education and political committee. This committee shall be divided into two sections of equal numbers, one an education section and the other a political section.

Each of the sections (education and political) shall be separately elected.

E The committee shall divide the amounts allocated to the fund, viz., 5 per cent. of the net profits, into two equal parts, and allocate one part to each, the education and political sections respectively, for their purposes.

Each section, the education and political, shall have power to appoint and remove a secretary, and such staff as shall be necessary, and shall determine their duties and remuneration.

F Then there are provisions with regard to the meetings of the committee. There can be no doubt that the rules to which I have referred authorise in express terms the constitution of a political fund out of the society's profit, and are sufficient to justify the society's action, unless the particular rules are *ultra vires* the society. The rules are, as I have already said, registered under the Industrial and Provident Societies Act, 1893, and it is necessary to consider the material provisions of that Act in order to come to a conclusion as to whether the rules are *ultra vires* or not. The Act is described as

an Act to consolidate and amend the laws relating to industrial and provident societies.

H It took the place of the Industrial and Provident Societies Act, 1876, which is repealed. The last-mentioned Act provided :

6. The societies which may be registered under this Act are societies (herein called industrial and provident societies) for carrying on any labour, trade, or handicraft whether wholesale or retail, including the buying and selling of land. . . .

7. With respect to the registry of societies, the following provisions shall have

effect: (1) No society can be registered under this Act which does not consist of seven persons at least.

(2) For the purpose of registry an application to register the society, signed by seven members and the secretary, and two written or printed copies of the rules, shall be sent to the registrar.

9. With respect to the rules of societies the following provisions shall have effect: (1) The rules of every society sent for registry shall contain provisions in respect of the several matters mentioned in the second schedule to this Act. A

The second schedule to the Act provides that the objects, name, and place of office of the society shall be stated. I need not deal with anything else, I think, but No. 10, s. 12 (7), which provides: B

The profits of the society may be applied to any lawful purpose.

A question arose under this Act as to the meaning of sect. 12 (7), and that question ultimately came before the Court of Appeal in the case of *Warburton v. Huddersfield Industrial Society* (1). In that case, the defendant was an industrial society, registered under the Act of 1876. By its rules, the objects of the society were declared to be the carrying on of certain trades and businesses, and, by r. 10, it was provided that: C

The net profits of all business carried on by this society, after paying or providing for the expenses of management, interest on loans, the proper reduction in the value of fixed stock, and for such interest upon the subscribed capital thereof as aforesaid, shall from time to time be applied, by direction of the ordinary quarterly meeting, either to increase the capital, reserve fund, or business of the society, or to any lawful purpose, and the remainder, less any grant that may be made for educational purposes at any general meeting, shall be divided— D

in the manner specified. The society, at a properly constituted meeting, passed a resolution that a contribution out of the funds of the society should be made to a strike fund for the support of a strike of workmen in the Huddersfield district. The question as to the validity of that contribution was tested on the true construction of r. 10, to which I have just referred, and the court held that the words "any lawful purpose" were restricted to some purpose of the society *ejusdem generis* with the purposes enumerated in the preceding part of the rule. It was pointed out, by each member of the Court of Appeal, that different considerations might have applied if the rules had been in a different form. LORD HERSCHELL, after calling attention to the words of the Act of 1876, sect. 12 (7), which provides that the profits of the society may be applied to any lawful purpose, said at p. 819: E
F
G

It may be that under sect. 12 of the Act, taken by itself, it would be open to an industrial society to provide by its rules that the majority at the meeting might apply a portion of the profits to any object that was not an illegal one. I do not go beyond that, and for this reason, that in the view which I take the question does not arise for decision here. H

LINDLEY, L.J., also called attention to sect. 12 (7), and said, at p. 821:

I cannot myself avoid coming to the conclusion that "any lawful purpose" in subsect. 7 means any lawful purpose which is consistent with the rules. It cannot mean anything inconsistent with the rules. The rules are to provide the mode of applying the profits. I do not think it would be possible to say, for

example, that if the rules prescribed a particular mode of applying the profits, any one could bring in subsect. (7) and say, "The profits of the society may be applied to any lawful purpose; therefore we will disregard the rules."

KAY, L.J., reserved his opinion as to the meaning of sect. 12 (7). As I said before, *Warburton's case* (1) was not decided under sect. 12 (7), but under the rules of the society as they existed at the time the action was brought. *Warburton's case* (1) was decided on Mar. 10, 1892. On Sept. 12, 1893, the Industrial and Provident Societies Act, 1893, was passed. As I have said, it is an Act to consolidate and amend the law relating to industrial and provident societies. Sect. 4 provides that :

A society which may be registered under this Act (herein called an industrial and provident society) is a society for carrying on any industries, businesses, or trades specified in or authorised by its rules, whether wholesale or retail, and including dealings of any description with land.

Sect. 5 deals with the conditions of registration, and provides for the registration of rules by the registrar. Sect. 10 (1) provides that :

The rules of a society registered under this Act shall contain provisions in respect of the several matters mentioned in the second schedule to this Act.

The second schedule is, for all practical purposes, similar to the second schedule of the Act of 1876, in that it includes, as one of the matters to be provided for by the rules, the mode of application of the profits. But the material subsection, in this case, is sect. 10 (6). That subsection provides :

The rules of every society registered under this Act shall provide for the profits being appropriated to any purposes stated therein or determined in such manner as the rules direct.

This subsection takes the place of sect. 12 (7) of the Act of 1876. It is to be observed that it is mandatory in force. It is no longer "The

profits may be applied to any lawful purpose," but the rules "shall provide for the profits being appropriated to any purposes stated therein."

The words "any purposes" are very wide. There is no restriction upon them in express terms. In my judgment, I am not entitled to limit them by restricting them to any purposes connected with the expressed objects.

The only limitation I can find is "determined in such manner as the rules direct." The alteration seems to me to have been made with regard to the decision in *Warburton's case* (1), because it meets the criticism directed to the rules to be found in the judgment of that case. In these circumstances, and having regard to the precise form of

r. 29 (5), and of r. 30, I have no hesitation in holding that the allocation of one-half of 5 per cent. of the profits of the society to the political fund, and the devoting of that fund to the political activity described, are valid objects, and neither of them is *ultra vires* the society. I am fortified in the view I have expressed by the decision of LORD ORMDALE

in *Lafferty v. Barrhead Co-operative Society* (2). In that case the question was whether the Barrhead Co-operative Society, Ltd., was empowered, by its rules, and by the Act of 1893, to apply part of its profits in promoting the return of co-operative candidates to Parliament, and to local government bodies. LORD ORMDALE said :

The question is whether sect. 10 (6) of the Act of 1893 gives the members of a society registered under the Act of 1893 power to vote a portion of its profits to the furtherance of political ends. Its terms appear to me to be such as to authorise the society to apply its profits to any purpose (which is not illegal) specified in or directed by the rules. Sect. 10 (1) and Sched. II have already enacted that the rules must provide for the mode and the application of the profits. Sect. 10 (6) goes a stage further and declares the purposes for which they are to be appropriated. The only limitation is that the purpose must be stated in the rules, or "determined in such manner as the rules direct." This limitation, and no other, is expressed. Such being the case, there is no room, or, indeed, right, to imply any further limitation from the remaining provisions of the statute, such as that the purposes must be ancillary to the trade or business, the carrying on of which gave the society the right to be registered. There was no section of the Trades Union Act under consideration in *Amalgamated Society of Railway Servants v. Osborne* (3), which corresponds to sect. 10 (6) of the Act of 1893.

LORD ORMDALE, having said that, went on to consider the rule relied upon in that case, and, having done that, considered that the rule was not wide enough to expend the profits in the way proposed, and, accordingly, he granted an injunction restricting the application of the money to the purposes in question. But it is quite plain, from his judgment that, if the rules had been formulated differently, and had expressly provided for the expenditure of part of the profits for political purposes, his decision would have been otherwise, and he would have held that such a rule was a valid and proper rule, and was not *ultra vires*. In the present case, the rules are so drawn as to leave no doubt in the mind of the reader that half of the 5 per cent. of the society's profits is to be paid over to a political fund and dealt with for the political purposes described. On this view, the action fails, and must be dismissed. Mr. Roxburgh and Mr. Danckwerts, on behalf of the defendant society, raise certain further questions with regard to the validity of the rule, on the footing that I might have taken a different view of the construction of sect. 10 (6). In my view, those questions do not really arise for decision, having regard to the view which I have expressed as to the proper construction to be placed upon sect. 10 (6); and I think it unnecessary to say anything further about those points, and I refrain from doing so. The action will be dismissed, and I suppose I must dismiss it with costs.

Action dismissed with costs.

Solicitors: *T. U. Liddle* (for the defendant society).

[Reported by W. K. SCRIVENER, Esq. Barrister-at-Law.]

BERG v. SADLER & MOORE.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Scott, L.JJ.),
February 12, 15, 1937.]

A *Sale of Goods*—"Price-maintained" goods—"Stop list"—Attempted purchase by person on stop list—Purchase money paid—Refusal to deliver—Recovery of price—*Illegality*.

Both the plaintiff and the defendants had entered into a price-maintenance agreement with the Tobacco Trade Association. The plaintiff, owing to alleged breaches thereof, had been placed upon the stop list. By means of third parties he attempted to obtain a supply of goods included in the agreement from the defendants and £72 19s. was in fact paid to the defendants as the price of the goods. They then suspected that the purchase was on behalf of a party who ought not to be supplied, and refused either to supply the goods or to return the money :—

B **Held** : the plaintiff had attempted to obtain goods by false pretences and could not maintain an action for the money paid.

C *Decision of MACNAGHTEN, J. ([1936] 2 All E.R. 456), affirmed.*

[EDITORIAL NOTE. This appeal proceeds upon the question whether the plaintiff was barred by his own false pretences from recovering the money paid. It is a well recognised principle that if the plaintiff in order to prove his case must set up his own illegality, he cannot succeed in his action, although it may be inequitable for the defendant to retain the money. The interest in the appeal is therefore confined to the fact that this is the first case of its kind in connection with a price-maintenance agreement.

D AS TO EFFECT OF ILLEGALITY, see HALSBURY, Hailsham Edn., Vol. 7, pp. 173-176, paras. 248, 249; and FOR CASES, see DIGEST, Vol. 12, pp. 281-289, Nos. 2307-2375.]

E Cases referred to :

- (1) *Pearce v. Brooks* (1866), L.R. 1 Exch. 213; 12 Digest 264, 2156.
- (2) *Scott v. Brown, Doering, McNab & Co., Slaughter & May v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 12 Digest 238, 1959.
- (3) *Simpson v. Bloss* (1816), 7 Taunt. 246; 12 Digest 279, 2283.
- F** (4) *Kearley v. Thomson* (1890), 24 Q.B.D. 742; 12 Digest 285, 2333.
- (5) *Collins v. Blantern* (1767), 2 Wils. 341; 12 Digest 260, 2122.
- (6) *Taylor v. Bowers* (1876), 1 Q.B.D. 291; 12 Digest 283, 2319.
- (7) *Alexander v. Rayson*, [1936] 1 K.B. 169; Digest Supp.
- (8) *Gordon v. Metropolitan Police Chief Comr.*, [1910] 2 K.B. 1080; 12 Digest 280, 2297.
- G** (9) *Holman v. Johnson* (1775), 1 Cowp. 341; 12 Digest 279, 2288.
- (10) *Bickerton v. Burrell* (1816), 5 M. & S. 383; 1 Digest 621, 2468.
- (11) *Feret v. Hill* (1854), 15 C.B. 207; 12 Digest 290, 2387.

APPEAL by the plaintiff from a judgment delivered by MACNAGHTEN, J., on May 18, and reported in [1936] 2 All E.R. 456. The facts are fully set out in the judgments of LORD WRIGHT, M.R., and MACNAGHTEN, J.

H *W. H. Cartwright Sharp, K.C.*, and *H. Glyn-Jones* for the appellant plaintiff.

Sir Walter Monckton, K.C., and *B. L. A. O'Malley* for the respondents. *Cartwright Sharp, K.C.* : There is nothing illegal in selling at cut

prices. If Reece or his partner had purchased the goods there could have been no suggestion of false pretences, and it makes no difference that the plaintiff sent his agent instead of asking Reece to make the purchase. Reece had authorised the purchase. See *Taylor v. Bowers* (6). A plaintiff who has made a contract as agent for a third person cannot sue as principal without giving notice to the defendant before action brought that he is the party really interested: *Bickerton v. Burrell* (10). If, however, he does give that notice, then he can at all events claim back the money which he has paid if the bargain is not carried out. The doctrine of *ex turpi causa non oritur actio* does not depend upon the defendant's position. The court merely says that it will not assist the plaintiff, because he has acted unlawfully: *Kearley v. Thomson* (4). The test whether a demand connected with an illegal transaction is capable of being enforced in law is whether the plaintiff requires any aid from the illegal transaction to establish his case: *Simpson v. Bloss* (3). The plaintiff paid this money to discharge the liability of Reece under a contract of sale, or alternatively paid money for cigarettes which have not been delivered. See *Feret v. Hill* (11).

Glyn-Jones, following for the appellant: The utmost that is complained of in Berg's conduct is that he failed to disclose to the defendants the ultimate destination of the tobacco. He owed no duty either to the Tobacco Trade Association or to the defendants not to obtain cigarettes so long as he obtained them legitimately, or, having obtained them, not to sell them at any price he chose. If Berg had gone to another wholesaler who had afterwards discovered that he was "stop-listed," that wholesaler could not have retained the money. The failure to disclose is not fraud, and no indictment could have been drawn against Berg on the facts found by the judge. Even assuming there were false pretences, the defendants cannot retain this money. The court has never held that where money has been paid upon a consideration which, so far as the payee is concerned, is lawful and is not in any sense immoral or contrary to public policy, the plaintiff is debarred from recovering because some circumstance in his conduct may be questionable. The true principle behind the decisions is not a desire to punish a wrongdoer, but a refusal to assist in the enforcement of a wrongful promise.

If the defendant is in possession of the plaintiff's money and shows no grounds for retaining it, that is sufficient to establish a cause of action: *Gordon v. Metropolitan Police Chief Comr.* (8). In that case the plaintiff brought into existence a document intending that it should be used for an unlawful purpose. In the present case there was no unlawful purpose. The money was paid to the defendants for no consideration except the supply of cigarettes, and there was nothing unlawful and no unlawful purpose in any conduct for which the defendants were being asked.

Monckton, K.C. : The claim involves setting out circumstances which show that it is founded on an illegality : *Alexander v. Rayson* (7).

LORD WRIGHT, M.R. : This case in some respects is peculiar and in

- A some respects it involves a novel application of the well known rule which is sometimes expressed in the maxim *ex turpi causa non oritur actio*. This, though veiled in the dignity of learned language, is a statement of a principle, and a principle of great importance, but, like most maxims, it is much too vague and much too general to admit of application
- B without a careful consideration of the circumstances, and of the various definite rules which have been laid down by the authorities. Our business here is to apply these rules, either precisely, according to the decisions which have been given, or following those decisions very closely, and acting on the analogy of those decisions.
- C The facts here can be very shortly stated. There is a body called the Tobacco Trade Association, members of which are either manufacturer members or the other class of traders, and the object of the Association is to prevent what is called "price-cutting" and to secure price-maintenance. The traders agree, in return for their being supplied with the
- D particular goods, namely, tobacco, cigarettes, and snuff, which come within the category of price-maintained goods, that they will not sell them at less than the prices fixed for those goods. There are minimum wholesale reselling prices, and there are minimum retail selling prices. Each trader who becomes a member of the Association pledges himself
- E that he will not sell these goods at less than the minimum prices. The plaintiff, Berg, was a member of that Association. He became so in Jan., 1934, but his membership was somewhat brief, because in Apr., 1934, it was discovered that he was breaking the terms of the agreement, and thereupon he became what is called a "cut-price retailer," and was
- F put on a list of retailers to whom the members of the Association will not supply goods. He carried on a hairdresser's business, but he apparently did a considerable amount of selling of cigarettes and other classes of tobacco goods, and I gather for some time he had to get his supplies as best he could from sources other than the members of the Association.
- G In that state of things, about Aug., 1935, he came into contact with one James Reece, who was a member of the Tobacco Trade Association, and was not under a cloud, and was in full enjoyment of the privileges of that Association. In effect, the plaintiff obtained from Reece a large supply of cigarettes, for which he paid £134 in cash, and these had been sold by
- H the defendants, as they thought, to Reece, but the transaction, as carried through, involved the plaintiff paying the price of £134 in cash, and the plaintiff's wife and Reece together going with the cash to the defendants and carrying off the cigarettes. I need not say any more about that transaction. I think the plaintiff paid to Reece a commission or profit

of £5. A little later, towards the end of August, it was obviously contemplated that that proceeding should be repeated, and Reece gave a written order to the defendants for a quantity of cigarettes, 39,500, at a price of £72 10s. The defendants received that order on the footing that they were supplying Reece, but what really happened was, as the learned judge has found as a fact, that the whole transaction was simply a scheme by which, through the intermediation of and under cover of Reece, the plaintiff was to get from the defendants a supply of cigarettes. It is perfectly clear that the defendants would not have supplied the plaintiff with cigarettes if they had known he was the purchaser, and that he was the person who was getting them. It was necessary so to arrange the transaction that the defendants would be deceived into supplying the cigarettes, and would believe that they were supplying them to Reece, whereas in truth, and in fact, they were supplying them to the plaintiff. The plaintiff sent one of his assistants in the hairdressing business to the defendants with £70 to collect the cigarettes, and he was accompanied, apparently, by a representative of Reece. There is a little obscurity about it, perhaps, but the plaintiff gave £70 to Schlisser, and told him to go with Reece's partner and another man to collect the cigarettes, and bring them round the very short distance that had to be traversed to the plaintiff's shop. There was some little difficulty, because the price was £72 19s., and the defendants refused to hand over the cigarettes until they got the extra £2 19s., so Schlisser, the assistant, had to go back to the plaintiff's to get another £3, and then, having got that, he paid it, and got a receipt, and the 1s. change.

But Mr. Moore, a member of the defendant firm, had some doubt or suspicion, and when he handed over the receipt he said that he would send the goods to Reece's place of business. Schlisser immediately said that would not do, demanded the money back, and Moore then said that it was an attempt to get the goods from him by false pretences. There was a curious letter (see [1936] 2 All E.R. at p. 460) produced which, if anything, would have increased suspicion, if that was necessary, and Mr. Moore refused to give back the money which had been paid to him, and eventually this writ was issued claiming the money. The judge has found thus:

I have no hesitation in saying that in this case Mr. Berg attempted, although the attempt failed, by deceit to induce a course of action on the part of the defendants, Messrs. Sadler & Moore, which would have been an action to their grave injury. If in fact they had supplied goods to Mr. Berg, he being on the "stop list," the consequences to them might have been consequences of a very serious character in their business. It seems to me that it is a plain case of where there was an attempt to obtain goods by false pretences, and it is nothing to the purpose to say that the fraudulent person who was attempting to commit that crime was in fact willing to pay to the persons he was attempting to defraud the full price of the goods.

And then the judge comes to the conclusion that the court would not entertain an action by a man for money dishonestly paid for the purpose

of committing an offence against the criminal law, and accordingly he dismisses the action. I agree with the conclusion at which he has arrived.

This case is in some respects peculiar, and is in some respect to be distinguished from other cases which have been before the court, and in which the court has refused to entertain the action on the ground of the illegality or immorality which was involved in the proceedings. I need not refer to a common type of case where an action is brought upon a contract, and the court refuses to entertain the action on the ground that, either by express terms or by the understanding of the parties, the contract was intended for the fulfilment of unlawful or immoral purposes, as in *Pearce v. Brooks* (1), and *Scott v. Brown, Doering, McNab & Co.* (2). This case presents its own characteristic features. The plaintiff paid over a sum of money to the defendants, intending the property in that money to pass to the defendants, and they took it intending that the property should vest in them, and that the money should be paid in pursuance of a contract of sale to Reece. So far, the transaction would have been perfectly binding, and the money, so far, would have been vested in the defendants. The plaintiff, however, has now come to demand the repayment of that money, and he can demand that repayment only on the ground that he is entitled to sue for it in an action for money had and received, and that it is contrary to what is *æquum et bonum* for the defendants to retain that money. In order to maintain an action for money had and received, he has to prove the exact circumstances in which the money was paid, and the circumstances which he says entitle him on grounds of justice to have an order for repayment, but, if he proceeds to that logical proof, and seeks to establish his claim, he can do so only by establishing the facts which show that he was engaged in this criminal attempt to obtain goods by false pretences, and I think, on well established principles, the court will refuse to give its aid to any claim which can be established only by proving facts of that nature.

For that general proposition I need refer to two cases only. One is *Simpson v. Bloss* (3), which was an action for money had and received. The plaintiff had laid an illegal wager with a third party. The defendant had assumed a part of the bet. The plaintiff won. The third party was the one to pay the debt, but he was going away, and he asked the plaintiff to advance to the defendant his share of the winnings. The third party, however, became insolvent, did not pay his debt, and the plaintiff sought to recover the amount of his advance from the defendant as money had and received. The court held that the action must fail. GIBBS, C.J., said this, at p. 250 :

How can he [the plaintiff] make out his claim, but by going into proof of the illegal transaction on account of which it is paid ? He says, the payment was on a condition which has failed ; but that condition was, that Brograve, who was concerned with the plaintiff and defendant in this illegal transaction, should make

good his part by paying the whole bet to the plaintiff; and it is impossible to prove the failure of this condition, without going into the illegal contract, in which all the parties were equally concerned.

This case falls within that general principle, though it is a somewhat different application of the principle. The illegality here, which necessarily must appear when the plaintiff sets out the facts on which he bases his claim, is his own illegality in attempting to commit a misdemeanour under the criminal law. The principle is the same and is very clearly stated by FRY, L.J., in *Kearley v. Thomson* (4). That case involved the further question, whether the contract had or had not been carried into effect. It was held that it had been partially carried into effect, and that was enough to prevent the plaintiff from succeeding. FRY, L.J., stated the general principle at p. 745. He first pointed out that the agreement which was in question was unlawful, as interfering with the course of justice. It was a bargain that the plaintiff should not take part in bankruptcy proceedings, and that would have interfered with the course of justice. FRY, L.J., said at p. 745 :

As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the £40 cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins v. Blantern* (5), where WILMOT, L.C.J., says : "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back."

FRY, L.J., goes on, in the course of his judgment, to distinguish the case of *Taylor v. Bowers* (6), where recovery was allowed, as I understand the decision, on the ground that the illegal purpose had been abandoned, and that the plaintiff had so repented that he was not debarred from recovering what he had paid. Some such argument was put forward in this case, but I should like to add to the expression of opinion of FRY, L.J., on that point the observations which are contained in a judgment of this court in *Alexander v. Rayson* (7), and I want to read a passage, at p. 190, from the judgment of the court, delivered by ROMER, L.J. :

Plaintiff's counsel further contended that inasmuch as the plaintiff had failed in his attempted fraud, and could therefore no longer use the documents for an illegal purpose, he was now entitled to sue upon them. [The plaintiff had failed in getting his cigarettes.] The law, it was said, would allow to the plaintiff a *locus pœnitentie*. So, perhaps, it would have done, had the plaintiff repented before attempting to carry his fraud into effect : see *Taylor v. Bowers* (6). But, as it is, the plaintiff's repentance came too late—namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no *locus pœnitentie*; see SALMOND AND WINFIELD'S LAW OF CONTRACT, p. 152. It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff's fraudulent purpose.

That passage seems to apply very fully to the present case. *Alexander v. Rayson* (7) also illustrates a further principle, applicable to the facts before this court. In *Alexander v. Rayson* (7), an action was brought on a lease against the tenant. The lease reserved a rent of £450 a year, and

- A it was accompanied by a further and separate agreement under which the lessee was to pay a further £750 a year, ostensibly for the performance of various services in connection with the letting. The court was of the opinion that the true value of the leasehold interest was £1,100 a year, and that that sum was split up into these two figures of £450 and £750
- B a year in order to deceive the assessment committee. In that action, which was brought by the lessor against the lessee, the lessee being entirely ignorant of, and unconcerned in, this fraudulent attempt, it was held that the court, on the facts being ascertained, would not give effect to the lease, which they held to have been concocted in the form in which
- C it was in order to effect an unlawful purpose.

Applying that principle, though in a somewhat different application of facts, to the present case, the £72 19s. in question here may be regarded as the instrument which the plaintiff was using to carry out his unlawful purpose of obtaining the goods by false pretences, and, just as the court,

D in *Alexander v. Rayson* (7), would not allow the lease to be used as an effective instrument, and would not give any remedy in respect of the lease when it was established that it was created in order to effect this fraud, so, I think, the court here will not give any remedy in respect of the £72 19s. once it is satisfied, as it is satisfied here, that that £72 19s.

- E was used in order to effect, if possible, this fraud, and was the instrument employed for the purpose of carrying out the fraud. So that the position of the defendants is that they are in possession of the money, which has passed to them under a contract *ex facie* lawful, but which has turned out to be a contract tainted by fraud, so far as the plaintiff is concerned,
- F and the defendants can rely on the principle *potior est conditio possidentis*, and the court will refuse to re-open the transaction, or order the money to be paid, on the ground of a failure of consideration.

- There are some other cases to which we have been referred. I do not know that it is necessary to discuss them at any length. I will mention
- G only one, *Gordon v. Metropolitan Police Chief Comr.* (8). The question there was something quite different. The only objection which was raised against the court giving the leave which was sought was that the money in question, at some earlier period, and in the course of transactions entirely irrelevant to the matter in question, had been obtained by
- H unlawful gaming. It was held that that was too remote. BUCKLEY, L.J., said at p. 1098 :

It is certainly the law that the court will refuse to enforce an illegal contract or obligations arising out of an illegal contract, and I agree that the doctrine is not confined to the case of contract. A plaintiff who cannot establish his cause of action without relying upon an illegal transaction must fail : and none the less

is this true if the defendant does not rely upon the illegality. If the court learns of the illegality, it will refuse to lend its aid. The rule is founded not upon any ground that either party can take advantage of the illegality, as, for instance, the defendant by setting it up as a defence. It is founded on public policy. LORD MANSFIELD in *Holman v. Johnson* (9), said "*Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

BUCKLEY, L.J., then points out that no such consideration entered into question in that case, and it is not a case which in any way, in my judgment, affects the conclusion at which I have arrived. The appeal should be dismissed with costs.

ROMER, L.J. : I entirely agree, and, once the facts of this case are understood, it is abundantly plain that no court in this country would lift a finger to help the plaintiff to recover from the defendants the money which the plaintiff paid to them. The money was paid by the plaintiff to the defendants in the course, and for the purposes, of an attempt, on the part of the plaintiff, to defraud the defendants ; the fact that, owing to the vigilance of the defendants, the attempt was frustrated is, in my opinion, wholly immaterial.

SCOTT, L.J. : I agree that this appeal should be dismissed with costs. It is no doubt open to this court to reconsider the details of the evidence before the learned judge if there be any reason to suppose that he has drawn wrong inferences, or applied wrong principles, but I see no reason for criticising the learned judge's conclusions of fact. He saw the witnesses, he came to a perfectly definite opinion about them, and found as a fact that the money was paid for a dishonest purpose. He thereupon said this :

I have no hesitation in saying that in this case Mr. Berg attempted, although the attempt failed, by deceit to induce a course of action on the part of the defendants, Messrs. Sadler & Moore, which would have been an action to their grave injury. If in fact they had supplied goods to Mr. Berg, he being on the "stop list," the consequences to them might have been consequences of a very serious character in their business. It seems to me that it is a plain case of where there was an attempt to obtain goods by false pretences, and it is nothing to the purpose to say that the fraudulent person who was attempting to commit that crime was in fact willing to pay to the persons he was attempting to defraud the full price of the goods. Now, those being the facts as I find them to be, the question arises, can Mr. Berg under those circumstances, having paid this money with the intention of obtaining goods by this false pretence, now maintain an action in this court to recover the money ? No case has been cited to me where the court has ever entertained any such action. If dishonest people pay money for a dishonest purpose, and then by good fortune the offence which they designed to commit is not committed, are they entitled in this court to come and ask for recovery of the money ? In my opinion they are not. It would be a bad example if this court were to entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law, and he were allowed to claim from the court an order that the money should be repaid.

I entirely agree with that judgment, which I have adopted as my own. At the same time, I agree with what LORD WRIGHT, M.R., has said, that the facts of this case involve a slightly new application of the rule, but *ubi eadem ratio ibi jus*. The principle which forbids the assistance

of the court to a plaintiff who asks it in order to effect a dishonest purpose extends, in my opinion, to the case of a request for the court's assistance in order to extricate himself from a pecuniary difficulty in which he has placed himself by an incomplete performance of a dishonest course of action. Here the plaintiff, by fraudulently inducing them to believe that somebody else was the purchaser, made a contract of purchase from the respondents. On their suspicions being aroused, after the purchase price had been paid, the respondents refused delivery of the goods. How does the plaintiff thereupon frame his action? He says he claims for money had and received upon the total failure of consideration of his contract, but the contract was fraudulently induced. In my opinion, he is inevitably invoking the assistance of the court to enforce that illegal contract, when he frames his claim in that way, and the maxim applies. Any other judgment would be contrary to the basic principles of justice.

Appeal dismissed with costs.

Solicitors: *Lamartine Yates & Morgan* (for the appellant); *Russell & Arnholz* (for the respondents).

[Reported by DEREK H. KITCHIN, Esq., Barrister-at-Law.]

AUCKLAND CITY COUNCIL v. ALLIANCE ASSURANCE CO., LTD.

PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, M.R., Lord Maugham), **November 30, December 1, 1936, January 26, 1937.**

Privy Council—New Zealand—Debenture bond and coupons payable at the option of the holder in London or New Zealand—Currency in which such payments may be made—Local Bodies Loans Act, 1913.

The respondent company was the holder of a debenture bond for £100 and the coupons still outstanding under it, issued by the appellant council as part of the Auckland City Tramway Loan. The coupon contained the following provision: "On presentation of this coupon at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being, on or after Jan. 1, 1936, the bearer will be entitled to receive £2 12s. 6d." The respondent company claimed a declaration that having exercised the option to be paid in London it was entitled to be paid in sterling, i.e., in English currency, as to both principal and interest. The appellant council contended that, under the provisions of the Local Bodies Loans Act, 1913, it would be *ultra vires* for it to borrow money in some currency other than New Zealand currency, and that the pounds meant by that Act were New Zealand pounds; and, further, that, as the conditions of the Act requiring that the debentures and coupons should be issued in pounds had been incorporated in the documents, such pounds were New Zealand pounds, as being the pounds postulated by the Act of 1913:—

HELD: (i) in principle the case was governed by the decision in *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (1),

and, accordingly, moneys payable on the debenture or the coupons, if the bearer elected to be paid in London, were payable in English currency.

(ii) the Local Bodies Loans Act, 1913, did not render it *ultra vires* of the corporation to borrow in any other pounds than New Zealand pounds. The word "pound" contemplated by that Act, at the time it was passed, meant the common unit of account, both in England and New Zealand, and the measure of value in currency which it connoted was the same in both countries.

Decision of the majority of the Court of Appeal in New Zealand ([1936] N.Z.L.R. 413) *affirmed*.

[EDITORIAL NOTE.] Upon the currency point the principle laid down in the *Adelaide* case (1) is applied. The parties having expressed no actual intention on the matter, the payment falls to be made in the currency of the place of payment, i.e., upon the exercise of the option to be paid in England in English currency. The second point is peculiar to this case. It was argued that the debenture following the exact terms of a New Zealand statute, the word "pound" could only mean a New Zealand pound, since in New Zealand that must be taken to be its meaning. This argument was rejected.

AS TO CURRENCY IN WHICH PAYMENT MADE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 173, 174, para. 251; and FOR CASES, see DIGEST Supp., Money and Moneylending 15a-61a.]

Cases referred to :

- (1) *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A.C. 122; Digest Supp.
- (2) *King Line, Ltd. v. Westralian Farmers, Ltd.* (1932), 48 T.L.R. 598; Digest Supp.
- (3) *Saskatoon City v. London & Western Trusts Co., Ltd.*, [1934] 1 D.L.R. 103; Digest Supp.
- (4) *Australasian Temperance & General Assurance Corporation, Ltd. v. Mount Albert Borough*, [1936] N.Z.L.R. 54.
- (5) *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (1934), 50 C.L.R. 581.
- (6) *Payne v. Deputy Federal Comr. of Taxation*, [1936] A.C. 497, [1936] 2 All E.R. 793; Digest Supp.
- (7) *Gisborne Borough v. Auckland Provincial Patriotic & War Relief Assocn.*, [1916] N.Z.L.R. 218.
- (8) *Mowbray, Robinson & Co. v. Rosser* (1922), 91 L.J. K.B. 524; 41 Digest 614, 4440.
- (9) *International Trustee for the Protection of Bondholders Akt. v. R.*, [1936] 3 All E.R. 407; Digest Supp.
- (10) *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (1932), 48 C.L.R. 391.
- (11) *Landsdowne v. Landsdowne* (1820), 2 Bli. 60; 17 Digest 315, 1265*xx*.
- (12) *Ottoman Bank of Nicosia v. Dascalopoulos*, [1934] A.C. 354; Digest Supp.
- (13) *Broken Hill Proprietary Co., Ltd. v. Latham*, [1933] Ch. 373; Digest Supp.

APPEAL from a majority judgment of the Court of Appeal of New Zealand (OSTLER, BLAIR, and KENNEDY, JJ., REED, Acting C.J., dissenting), dated June 10, 1936, of an action instituted by the respondent company in the Supreme Court of New Zealand (FAIR, J.), on Mar. 6, 1936, and by consent removed into the Court of Appeal for hearing

and adjudication upon an agreed statement of facts, which are set out in the judgment of their Lordships delivered by LORD WRIGHT, M.R.

Hon. S. O. Henn Collins, K.C., Alexander Ross, and Joseph Stanton for the appellant council: At all material times the English pound and the New Zealand pound were different, the currency of England was different from the currency of New Zealand, and there was not a unit of account common to England and to New Zealand. On a proper construction of the debenture and the coupon attached thereto, the £100 and £2 12s. 6d. are payable in New Zealand currency, and the respondent company is accordingly entitled to be paid only in New Zealand money converted into sterling at the rate of exchange current at the date of conversion. It would have been *ultra vires* of the corporation to issue debentures for payment in any currency but New Zealand currency. [Counsel referred to: *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (1), *Payne v. Deputy Federal Comr. of Taxation* (6), *Saskatoon City v. London & Western Trusts Co., Ltd.* (3), *Gisborne Borough v. Auckland Provincial Patriotic and War Relief Assocn.* (7), *Mowbray, Robinson & Co. v. Rosser* (8), *International Trustee for the Protection of Bondholders Akt. v. R.* (9), *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (10), *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society* (5), *Landsdowne v. Landsdowne* (11), *Ottoman Bank of Nicosia v. Dascalopoulos* (12), *Broken Hill Proprietary Co., Ltd. v. Latham* (13).]

Gavin T. Simonds, K.C., and Wilfrid Barton, for the respondent company: It is not *ultra vires* of the appellant council when the respondent company has elected, as it is entitled to do by the contract, to be paid its interest in London, to pay that interest at its nominal value in British currency. That is what the contract plainly provides that the appellant council must do. Upon the exercise of the option, London was the *locus solutionis* and the place of performance.

[Their Lordships had intimated that they did not desire to hear the respondent company upon the other issues.]

LORD WRIGHT, M.R.: The question to be determined in this appeal is what are the rights of the Alliance Assurance Co., Ltd., the respondent company, under a debenture bond for £100 and the coupons still outstanding under it of which it is the bearer. The bond and coupons were issued by the mayor, councillors and citizens of the city of Auckland, in New Zealand, the defendant council in the action, and the appellant before this Board. The Auckland Transport Board, which was a third party in the action, is also an appellant, but no question arises in this appeal as to its position.

The debenture bond is number 1744 and is for £100. It was issued

under the common seal of the appellant corporation on Feb. 9, 1920. It is headed :

Auckland City Council, Auckland, New Zealand. Auckland City Tramway Loan of £1,250,000. Secured on the revenues of the city of Auckland, subject to the existing loans chargeable on such revenues—

and is payable at the holder's option either in Auckland, New Zealand, or in London on July 1, 1940, and is expressed to be issued by the Auckland City Council, New Zealand, under the Local Bodies Loans Act, 1913, and the Appropriation Act, 1915, s. 26. It provides by its terms that :

On presentation of this debenture either at the Bank of New Zealand, Auckland, New Zealand, or at the Bank of New Zealand, London, England (at the option of the holder hereof) on July 1, 1940, the bearer will be entitled to receive £100. Interest on this debenture will cease after the day when the payment falls due unless default is made in payment. This debenture bears interest at the rate £5 5s. per cent. per annum payable on Jan. 1 and July 1 in each year on presentation of the attached coupons.

The coupon now in suit is No. 33. It is headed :

Auckland City Tramway Loan, 1920. Of the city of Auckland, New Zealand, issued under the Local Bodies Loans Act, 1913, and the Appropriation Act, 1915, s. 26, secured on the revenues of the city of Auckland, subject to the existing loans chargeable on such revenues.

It contains the following provision :

On presentation of this coupon at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being, on or after Jan. 1, 1936, the bearer will be entitled to receive £2 12s. 6d.

It is signed by the mayor and the city treasurer. The series of debentures, of which No. 1744 forms one, was issued in the following circumstances. An English registered company had, some years before 1919, constructed a tramway system in the city of Auckland. In 1919, while it was operating the system, it gave an option to the appellant corporation to purchase the tramway undertaking with all its assets. In consequence, an agreement was entered into dated Feb. 16, 1920, between the English tramway company and its mortgagees, an English investment company, on the one hand, and the appellant corporation on the other, for the sale of the whole of the tramway undertaking, its lands, its various rights, and all its assets, for the total aggregate sum of £1,227,201 8s. 7d. The price was to be satisfied by a payment to the vendor company of £1 8s. 7d. in cash, and by the issue to it of debentures for the total sum of £1,227,200. According to the agreement, the rate of interest on a certain proportion of these debentures was £5 per cent. per annum, and, as to the balance, £5 5s. per cent. per annum. The agreement provided that the debentures should rank *pari passu*, and should be payable, both as regards principal and interest, at the option of the holder for the time being, either in London or in Auckland, and should be in denominations from £20 to £1,000, as required by the

vendor company. The consideration for the sale was arrived at on the basis of certain items which were set out in the agreement. Certain of these items were sums in sterling, in particular the amount of the mortgage debt of the tramway undertaking, which was £393,750, and the amount representing the net profits, subject to an allowance, of the tramway company for the year ending June 30, 1919. Other sums were presumably in New Zealand currency, such as the sum representing the liabilities of the tramway company existing at the date of the agreement. There was nothing expressed in the agreement to show in what currency the sum of £750,000, which was the major part of the consideration, was calculated. The transaction thus took the form of a sale by the vendor company to the appellant council as the purchaser of the property for the sum above stated. This sum was satisfied by a cash payment of £1 8s. 7d. and by the issue of the debentures. The transaction amounted in substance to a borrowing from the vendor company by the purchaser council of the balance of the purchase price, which took the form of the issue of the debentures.

The dispute which has now arisen is whether the respondent company is entitled to be paid the principal and interest in sterling, that is, in the currency of England, on the assumption or basis of its having availed itself of the option to be paid in London, or whether its right on that footing is merely to be paid in the currency of New Zealand, which in 1936 was considerably depreciated. The action, which was brought by the respondent company, claimed a declaration that it was entitled to be paid in sterling, that is, in the currency of England, both as to principal and interest, and in particular claimed payment of 13s. 1d., as being the difference between £2 12s. 6d., the sum due under the coupon in question, and the sum of £1 19s. 5d., the sum tendered to it in respect of its coupon when, having exercised its option to be paid in London, it duly presented the coupon for payment at the Bank of New Zealand in London. This sum of 13s. 1d. represented the difference in value between sterling and New Zealand currency as applied to the amount of £2 12s. 6d. expressed in the coupon.

The rights and liabilities under the debenture and the coupon depend on the terms set out in them. For the purposes of this appeal, the question can be considered as if the instrument simply provided for payment in London; the option to require payment in New Zealand may be disregarded, as the actual or assumed basis of the proceedings is that the London option has been duly exercised. The instruments, as already stated, bear on their face a reference to the Local Bodies Loans Act, 1913 (hereinafter called the Act of 1913), and the Appropriation Act, 1915, s. 26. The latter Act is not material, but the former Act requires to be considered. The appellant corporation is a statutory body incorporated in New Zealand, and is subject to the Act of 1913, which con-

tains a code regulating the conditions and the procedure under which a local authority such as the appellant corporation is entitled to borrow money for public purposes, including the purchase or acquisition of any land, building, erection or structure. It is not disputed that the appellant corporation is bound by the conditions of the Act, and that these conditions are made part of the terms of the debenture and coupon by the express reference to the Act already mentioned. The various requirements of the Act, for the purpose of obtaining the consent of the ratepayers, were in form duly complied with. The Act also provided for the security which might lawfully be pledged for a loan. Certain sections of the Act which have been the subject of argument before their Lordships call for special mention. These deal in particular with the form and contents of any debentures. Thus, it is enacted that the debentures shall be for sums of not less than £20 and not more than £1,000, and shall be in the form set out in the schedule. That form was precisely followed in the series of debentures in question. The matter most material to be noted is that the debenture in the scheduled form is to be for [blank] pounds, using the symbol £. This agrees with the provision in the body of the Act just quoted, that the sum is to be for not less than £20 and not more than £1,000. The Act also prescribes that the yearly interest on every debenture shall not exceed $5\frac{1}{2}$ per cent., and shall be payable half-yearly or otherwise. There is also a prescribed form of coupon, which requires the amount to be expressed in pounds. The coupon in question complies with the prescribed form. Sect. 29 (1) provides that the local body may appoint any incorporated company or association, or any such company or association, together with one or more persons within or out of New Zealand, to be agents for raising and managing any loan authorised to be raised under this Act, such agent to have full power to raise the loan, and to deal with the moneys, subject to the direction of the local authority. The Act also contains a series of provisions dealing with the repayment of the loan, of which the most material are sect. 32 which provides that the sum of money named in any debenture shall be payable at the place, within or out of New Zealand, named in the debenture, at the time named thereon, being not longer than 50 years from the issue thereof, and sect. 33, which requires the local authority to make provision for a repayment, either by means of a sinking fund, or by periodical drawings. Sect. 42 may also be mentioned. That section provides for the case of default being committed in payment of the sum secured by any debenture or any coupon when it is presented at the place where, and the time when, it is payable, or subsequently. In that event, the holder is entitled to apply to a judge of the Supreme Court (that is, of New Zealand) by a petition in a summary way for relief under the Act, and the judge is authorised to appoint a receiver of the local fund, or other property, of the local authority,

which is liable under the provisions of the Act for the payment of the debenture or coupon.

- In 1913, when this Act was passed, the gold sovereign was legal tender both in England and in New Zealand, and the various notes current in both countries were redeemable in gold. In both countries, the unit of account, the pound, was the same. The word "pound," accordingly, at that time, whether used in an instrument made in New Zealand, or in an instrument made in England, had, in the full sense of the term, the same connotation; it meant the same unit of account, and the measure of value in currency which it connoted was the same, namely, the gold sovereign, minted by the Royal Mint, whether at the English Mint or at its Australian branch or branches. It is not necessary here to deal specifically with shillings and pence; these also were the same in both countries as units of account, and were represented as measures of value in currency by silver and bronze token coins. On the outbreak of the Great War in Aug., 1914, changes were made in the currency in each of the two countries. Both in England and in New Zealand gold coins for all practical purposes went out of circulation. In England, the export of gold, which had previously, during the War, been prohibited by regulation, was prohibited by an Act of 1920. In 1925, by the Gold Standard Act of that year, the Bank of England, which had been under an obligation to pay its own notes and the Treasury notes then current in gold, was relieved of that obligation, and was required only to sell bullion in bars of about 400 oz. at a fixed rate. Then, in 1931, by the Gold Standard Amendment Act of that year, the obligation to sell gold bullion at a fixed rate was suspended. Thus, in England, by 1931, the country had gone off the gold standard, and the notes of the Bank of England which constituted the note circulation were no longer convertible into gold. In New Zealand, a somewhat different course was taken. Before 1913, there was a certain number of trading banks in New Zealand, issuing their notes of a denomination of £1 or upwards, which were in form promises to pay a pound or pounds sterling. In 1914, there was passed in New Zealand the Banking Amendment Act, 1914, under which the Governor-General in Council was empowered by proclamation to declare that notes payable on demand by any bank named in the proclamation, and subsequent issues should be, during the period limited by the proclamation, legal tender in New Zealand. While any such proclamation was current, the condition that the bank should pay notes of its own issue in gold, on presentation at the bank, was to be suspended for the period limited by the proclamation first made under the Act, or by successive proclamations, if more than one. But the Act provided that the Governor-General in Council might require that adequate security should be given by the bank for the performance of the condition that the bank would duly pay

its notes in gold after the expiration of the period limited by the proclamation or proclamations. During the period limited by any proclamation, the export of gold was prohibited, except with the consent in writing of the Minister of Finance. In fact, a proclamation was made in 1914, under this Act, for 2 years, and thereafter further such proclamations were successively made from time to time. These proclamations covered the whole period from Aug., 1914, until Aug., 1934. At that latter date, the Reserve Bank of New Zealand Act, 1933, came into operation, under which the Reserve Bank of New Zealand was empowered to issue bank notes, and the authority of the various trading banks to issue or re-issue bank notes in New Zealand was determined. Thereupon the bank notes of these banks practically went out of circulation. The bank notes of the Reserve Bank, which are now practically the only notes in circulation in New Zealand, are in form a promise to pay so many pounds, and contain no reference to sterling, unlike the notes previously issued by the trading banks. The position, in effect, has thus been that, from 1914 until 1934, the redeemability of the note currency in gold was suspended. No doubt the Act of 1914 was originally intended to be an emergency measure for the time, but, by the successive renewal of proclamations, the operation of the Act was continued, until, in 1934, the note currency was finally and definitely made irredeemable in gold. These respective changes in the legal tender or currency of the two countries have had a reflection in the rate of exchange and in the relative values *inter se* of the two currencies. If regard is had to the telegraphic selling rates, New Zealand on London, there had before 1914 been a variation, depending, presumably, on the relation of supply and demand. Thus, from 1904 to 1914, the rate, New Zealand on London, was at 17s. 6d. per cent. premium. From Dec., 1917, to Sept., 1920, it was 20s. per cent. premium. It then rose for about 2 years, but in 1922 it was 5s. per cent. premium, and, in 1924, for a short period, it was at par; in 1925, it was at a discount; in 1930, the premium had actually risen to £5. Eventually, in 1933, there was a steep rise in the premium; in Jan., 1933, the exchange stood at £125 New Zealand for £100 London, and in Aug., 1934, at £124 10s. It was in consequence of that marked divergence in value between the two currencies that the present difficulty has arisen. Until that occurred, the debenture coupons, in cases where the London option was exercised, were paid in English currency, without question. But the appellant council, in and after 1934, contended it was bound to pay only in New Zealand currency, and, in the result, the present action was brought.

The case was tried in the Court of Appeal under an order for removal to that court on an agreed statement of facts. The court was divided in opinion. The majority, consisting of OSTLER, BLAIR, and KENNEDY, JJ., was of opinion that the claim of the respondent company

should be upheld. REED, A.C.J., dissented, and was for deciding in favour of the appellant corporation. He was of opinion that the New Zealand pound was a different unit of value from the English pound, and was of a different value from the English pound, and that, in all the circumstances of the case, the proper inference to be drawn was that the moneys to be paid under the debenture and the coupon were to be computed in the New Zealand currency, free from any allowance or deduction for conversion from New Zealand currency into English currency. In his view the contract was a purely New Zealand contract, because it was made under the authority of the municipal law of New Zealand, and in reference to the purchase of an undertaking which was operated in New Zealand, and because repayment of the money was secured on property situated in New Zealand, and, also, because the debentures were delivered in New Zealand, to be disposed of as the vendor company of the tramway undertaking thought fit. He also relied on the circumstance that the contract was subject to the terms of the Local Bodies Loans Act, 1913. The three judges who took the contrary view were of opinion that, in principle, the case was governed by the decision of the House of Lords in the case of *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (1), and, accordingly, that moneys payable on the debenture or the coupons, if the bearer elected to be paid in London, were payable in the appropriate number of pounds according to the currency of England, that is, in sterling, or in British pounds. Though the proper law of the contract was New Zealand law, that did not affect, in their opinion, the result in this case, that, where the place of payment was in London, the money was payable in sterling. They further held that there was nothing in the terms of the Act of 1913 to lead to any other conclusion, because they held that it was not *ultra vires* to contract loans such as those in question in any other than New Zealand currency, and that the terms of the Act did not compel, irrespective of the place of payment, a construction of the word "pound," connoting a payment according to the currency of New Zealand.

Their Lordships are in substantial agreement with the conclusions of the majority of the court. Up to a point, in their judgment, this case in principle is precisely governed by the opinions of the House of Lords in the *Adelaide* case (1). That authority, it is true, had reference to a contest whether sterling, that is, English currency, or Australian currency, was applicable, but, for all purposes of the present appeal, there is no difference in substance between the divergence which occurred in the currency values as between England and Australia, and the divergence which occurred in the currency values as between England and New Zealand. There are two dates which, in a case of this sort, may have to be considered as material dates; one is the date when the contract is made, and the other is the date at which the contract requires payment

to be effected. It is as at the latter date that the measure of value, expressed by the word "pound" in the contract, will have to be ascertained, and that will depend on the precise state of the relevant currency at the particular date, but it is as at the date of the contract that it must be decided what currency is meant, by the contract, as the currency, or measure of value, in which the contract obligation is to be discharged. That latter question can be settled only by determining, as a matter of construction, what, in all the circumstances of the case, is the meaning of the word "pound" used in the contract. This problem arises only where the contract uses a common unit of account, like the pound, as the denomination in which the obligations are expressed. A difficulty arose in the *Adelaide* case (1), because, in 1921, a change was made in the articles of association of the Adelaide company, which was an English registered company, whereby the place of payment for the debenture was shifted from London to Adelaide in Australia. Up to that time, while the place of payment was in London, there could be no question that the term "pound" used in the articles of association had reference to English or sterling currency. In 1921, when the articles were changed in the sense explained, there were no express terms inserted to define in what currency the payment was to be made. The reason for that omission, no doubt, was that the parties did not think about it, because, at that time, the difference between the sterling pound and the currency pound was little more than negligible; indeed it could not definitely be pronounced in what direction the exchange would go, whether in favour of London or in favour of Australia. But when, at a much later date, namely 1931, there emerged a very substantial divergence in the values of the two currencies, the problem was raised which was eventually settled by the House of Lords. The five Lords of Appeal who gave judgment in the House of Lords were all in agreement as to what the decision of the House should be. LORD RUSSELL puts the problem and the answer in these terms: he says, at p. 148:

If this be the correct view this problem would resolve itself into a case of the company becoming indebted from time to time in amounts payable in Australia, and expressed in terms of units of account common to Australia and England. The question then is, how can the company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid.

It is quite clear that the whole problem arose because of the divergence in value of the two currencies, and it was solved, as a question of construction, by determining what currency, on the true construction of the contract, was connoted by the use of the word "pound." It was held that, in the absence of express terms to the contrary, or of matters

in the contract raising an inference to the contrary, the currency of the country in which it was stipulated that payment was to be made was the currency meant. Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency. The problem is likely to arise only where the contract is made at a time when there is little or no practical difference between the two currencies of the two countries concerned, or where they have both the same currency and the same unit of account, but, subsequently, at the due date of performance, the values of the two currencies have sharply diverged. If, at the time when the contract is made, there is a practical divergence in value between the two currencies, the parties, in all probability, will expressly stipulate what currency is intended. An illustration of such a case is to be found in *King Line, Ltd. v. Westralian Farmers, Ltd.* (2). A charterparty, made in Sept., 1930, for the charter of a British ship, on a voyage from Western Australia to Great Britain or the Continent, contained various stipulations for payments, some to be made in Australia and some in Great Britain. The latter were stipulated to be payable in sterling, but the former sums were stipulated to be payable in Australian currency. The parties had thus, by their express agreement, excluded any question as to what currency was intended. It seems also that *Saskatoon City v. London & Western Trusts Co., Ltd.* (3), was decided on the principle that there was, in that case, an express term embodied in the bye-laws under which the debenture was issued, providing that the debentures and coupons were to be payable in lawful money of Canada or in sterling money of Great Britain. The debentures were expressed in dollars, and it was held that the terms of the bye-laws excluded all methods of payment other than a payment either in lawful money of Canada or in sterling money, and accordingly, that the debentures, which were expressed in dollars, were payable in Canadian dollars, though they were made payable at the offices of the Bank of Montreal in New York or at the offices of the said bank in London, England.

In the *Adelaide* case (1), however, there was no express term to show what currency was intended by the word "pound." The House of Lords held that the true meaning of the word "pound" must be determined on the basis of a rule depending on a well known principle of the conflict of laws, namely, that the mode of performance of a contract is to be governed by the law of the place of performance. That principle, no doubt, is limited to matters which can be fairly described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract; but when it applies, as in the *Adelaide* case (1), it has the effect of introducing into the contract the law of currency or legal tender governing in the place of payment as a mode or method incidental to performance. Thus, where

there is a common unit of account, to which the same denomination applies, as is the case with the word "pound" here, the debt expressed in the common unit must, in the absence of contrary evidence of actual intention, be discharged by payment in the currency of the place of payment. That was the decision in the *Adelaide* case (1), which, subject A to a further matter, to be next discussed, governs the present case.

In this case, as in the *Adelaide* case (1), the pound is the common unit of account. It is true that, at the date of the debenture, there was little or no practical difference between the value of the New Zealand currency in New Zealand and the value of the sterling currency in England; no B doubt for that reason the parties did not feel it necessary expressly to stipulate which currency was intended by the contract. That was left to be determined by the court, in accordance with the general principles of law, and in accordance with the place of payment which the bearer C adopted under the option given to him. It has, however, been strenuously contended that there is a further factor to be taken into consideration here, namely, the conditions of the Local Bodies Loans Act, 1913. The material provisions of that Act have already been set out in an earlier portion of this judgment. It is contended on behalf of the D appellant council that the Act of 1913 takes this case out of the ruling in the *Adelaide* case (1) on one or other, or on both, of two grounds. It is said, in the first place, that the effect of the Act of 1913 was to render it *ultra vires* of the corporation to borrow in any other than pounds, E that is to say, the pounds meant by the Act, which were New Zealand pounds, and that the contract must anyhow be so construed, whatever the place of payment, in order to prevent it being held *ultra vires* and F void, on the principle *ut res magis valeat quam pereat*. It is further, or alternatively, contended, on similar grounds, that the *prima facie* rule of construction applied in the *Adelaide* case (1) is excluded by the conditions of the Act of 1913 incorporated in the documents, which require that the debentures and coupons should be issued in pounds, that is, F New Zealand pounds, as being the pounds postulated by the Act of 1913. Their Lordships cannot accept either contention. They do not think any question of *ultra vires* arises. On the plain reading of the Act of G 1913, they think that the "pound" contemplated and authorised by the Act means the common unit of account current in Great Britain and in various parts of the British Empire, and that the currency which it H connotes, in the case of any particular loan, will be determined by the place, whether within New Zealand or outside of New Zealand, stipulated as the place of payment in the debenture. The sections of the Act of 1913 quoted above in this judgment show clearly that the place of payment contemplated by the Act may be a place either within or without New Zealand. This in particular appears from sect. 32, and from sect. 29 (1), and from other sections which are quoted above. For obvious

financial reasons, a country like New Zealand will desire to raise money in other than the local financial markets. Thus, it may desire to float a loan in England, or in one of the Australian States ; if it floats such a loan, and issues debentures expressed in pounds payable in

A London or in, for example, Melbourne, such a financial operation is within the conditions of the Act, and will carry with it, according to the rules of law now established, the consequence, that, if nothing more is said in the debenture, the pounds in question will connote a currency either of England, if the loan is repayable in London, or of Australia,

B if the loan, for instance, is repayable in Melbourne. That such a loan is within the provisions of the Act of 1913 has already been recognised by the Court of Appeal in New Zealand in the case of the *Australasian Temperance and General Assurance Corpn., Ltd. v. Mount Albert Borough Council* (4). In that case, the debentures were issued in New Zealand,

C under the Act of 1913, payable at the Bank of New Zealand, Melbourne, and were expressed to be in pounds. The question debated in that case was not the determination of the currency, but whether the law of Victoria, which had enacted a general reduction of the rate of interest payable in respect of loans, applied to the New Zealand contract, under

D which the interest on the loans was to be paid in Melbourne. The Court of Appeal in New Zealand held that it did not ; they distinguished the *Adelaide* case (1), on the ground that, in the *Adelaide* case (1), the question was merely as to the mode or method of performance, whereas in the case before them the Victorian law did not, and could not, have

E the effect of changing the substance of the New Zealand contract. It is, however, clear that the Court of Appeal treated the debentures as properly issued within the terms of the Act of 1913. A similar decision was arrived at by a majority in the High Court of Australia in the case of the *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident*

F *Society, Ltd.* (5), where debentures of a New Zealand corporation had been issued payable in New South Wales, and the question was whether the rate of the interest was reduced under a New South Wales statute, the Interest Reduction Act, 1931, and its amendments. It was held that the debenture was a New Zealand obligation, and was not affected by

G the Act. The case is here referred to merely as a further illustration of the practice of validly issuing, under the Act of 1913, debentures payable in pounds, but payable in other than New Zealand currency, because not payable in New Zealand. A reference in the argument before their Lordships was made to a case of *Payne v. Deputy Federal Commissioner of Taxation* (6), in which there was some discussion of the decision in the *Adelaide* case (1). The decision of this Board, however, in *Payne's*

H case (6), throws no light upon the matters at issue here. The only question in that case was whether, under the Australian Income Tax Acts, an Australian taxpayer, who had received assessable income in

pounds sterling under English securities, was compelled, in bringing sterling income received in England and not remitted to Australia into his income tax returns, to convert it to terms of Australian currency. It was held that he was.

For all these reasons, their Lordships are of opinion that the appeal fails, and that the coupons in question are payable in English currency, without any allowance for exchange, and so, also, is the debenture, when it falls due, always provided that the bearer exercises the option to be paid in London. They are also of opinion that the claim of the respondent company to be paid 13s. 1d. succeeds. The judgment of the Court of Appeal in New Zealand will accordingly be upheld, and the appeal dismissed. Their Lordships will humbly so advise His Majesty.

In accordance with an agreement between the parties, no order is necessary respecting the costs.

Appeal dismissed.

Solicitors: *Wray, Smith & Halford* (for the appellant council); *Dawes & Sons* (for the respondent company).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

TAYLOR v. SIR WILLIAM ARROL & CO., LTD.

[KING'S BENCH DIVISION (Singleton, J.), **January 15, 1937.**]

Workmen's Compensation—Double remedy—Election—Infant dependants claiming compensation, widow proceeding under Fatal Accidents Act—Workmen's Compensation Act, 1925 (c. 84), ss. 8 (3) (ii), 29.

A workman met with a fatal accident. A claim under the Workmen's Compensation Act, 1925, was made by two infant dependants. The widow, acting under advice, stated that she proposed to take proceedings in another court to recover damages in respect of her husband's death, but declined to make or give up any claim to compensation under the Act. The county court judge, acting under Workmen's Compensation Rules, 1926, r. 4 (2), then made an order joining the widow as respondent to the arbitration proceedings, stating that the order was made without prejudice to her right to proceed under the Fatal Accidents Act or to claim compensation under the Act. The employers contended that by reason of the above matters the widow was barred from bringing an action under the Fatal Accidents Act, she having elected to proceed under the Workmen's Compensation Act:—

HELD: (i) the widow had not in law or in fact exercised an option to claim compensation under the Workmen's Compensation Act.

(ii) it was open to the widow to bring proceedings under the Fatal Accidents Act, and for the children at the same time to proceed under the Workmen's Compensation Act.

(iii) the provisions of the Workmen's Compensation Act, 1925, s. 8 (3) (ii), do not make such proceedings impossible, in that, in such a case, it would be impossible to make a proper award of compensation in respect of the children under the section.

[EDITORIAL NOTE.] The question here is one of procedure. In *Codling v. John Mowlem & Co., Ltd.* (2), the widow by taking part in the Workmen's Com-

compensation proceedings, but without obtaining any compensation herself, was held to have barred her claim under the Fatal Accidents Act. The principal reason of that decision would appear to be that the widow consented to an award of the total amount of compensation payable under the Act. In the present case that result has been avoided by obtaining an adjournment of the compensation proceedings pending the trial of the action by the widow. If this is done, it would appear that the widow may, if she is successful under the Fatal Accidents Act, obtain damages, and if she is unsuccessful, may ask for an award of compensation. In the latter case it is to be presumed that the actual award of compensation will be referred back to the county court in which the infant dependants are proceeding. This decision, however, does not deal fully with this last aspect of the matter, as it was beyond the matter arising for decision.

AS TO ELECTION OF REMEDIES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195-199, paras. 430-438; and FOR CASES, see DIGEST, Vol. 34, pp. 490-494, Nos. 4063-4082. See WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., p. 461.]

C Cases referred to :

- (1) *Scarf v. Jardine* (1882), 7 App. Cas. 345; 4 Digest 450, 4069.
- (2) *Codling v. Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055; 34 Digest 491, 4067.
- (3) *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.

D PRELIMINARY POINT OF LAW ordered to be tried by an order of the master, dated July 1, 1936. The facts and the history of the proceedings are fully set out in the judgment.

G. G. Baker for the plaintiff.

J. Alun Pugh for the defendants.

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SINGLETON, J. : This case comes before me on a preliminary point. It was ordered by the master on July 1, 1936 :

F That the point of law raised in paras. 6 and 7 of the defence may by consent be set down for hearing by a judge alone in Middlesex as a preliminary issue in accordance with R.S.C., Ord. 25, r. 2, together with the notes of His Honour JUDGE CRAWFORD in the proceedings in the Southwark county court therein mentioned as agreed by the defendants' solicitors by a letter dated June 18, 1936.

The plaintiff, Mrs. Florence Taylor, is the widow of William Nicholson Taylor, and the action is brought by her on her own behalf. It is an action under the Fatal Accidents Act, 1846, and it is brought in respect of the death of her husband, which she alleges was caused by negligence on the part of the defendants, and was caused in circumstances which give her a right of action. Her husband was engaged upon the demolition of Waterloo Bridge on Aug. 16, 1935, and he met with an accident which caused him to fall into the river, and he died almost at once from the injuries he then sustained. It is not necessary at this stage to go into the nature of the accident at all, for all that I am concerned with is the preliminary point which is raised by paras. 6 and 7 of the defence. Of course, the defendants have raised other defences which in certain events

will be for consideration by someone else at some other time. These paragraphs are as follows :

6. In the alternative the defendant company says that by an application filed in the county court of Surrey holden at Southwark (No. of Matter P. 359) and dated Nov. 29, 1935, Dorothy May Taylor and Eric William Taylor, being the infant children of the plaintiff, applied by Thomas John Taylor, their next friend, for compensation to be paid to them under the Workmen's Compensation Act, 1925, as dependants of the said William Nicholson Taylor. 7. On Jan. 23, 1936, the plaintiff attended the said county court at the hearing of the said application and was made a party to the said proceedings in the said county court by order of the court and the defendant company will contend that this action is thereby barred and is not maintainable by the plaintiff by virtue of the provisions of the said Act.

The accident which resulted in the death of William Nicholson Taylor occurred on Aug. 16, 1935. The deceased man left the widow, who is the plaintiff, and two infant children. On Nov. 15, 1935, the solicitors for the plaintiff wrote to the solicitors for the defendants, in these terms :

Taylor v. Sir Wm. Arrol & Co., Ltd.

This matter has been considered carefully since the receipt of your letter of Aug. 23, and it has been decided that, if your clients are prepared to pay the amount due to them under the Workmen's Compensation Acts, that shall be accepted on behalf of the two infant dependants, Eric William Taylor, son of the deceased, born Apr. 12, 1924, and Dorothy May Taylor, born Jan. 27, 1915, who suffers from some trouble with her eyes and cannot work. Her dependency we are ready to agree at 5s. per week. The marriage of the deceased took place at Great Clacton Church on Aug. 5, 1907. It is the intention of the widow to take other proceedings in respect of her own claim, but we presume your clients will be prepared to admit liability in respect of the two children, and pay the proper amount into the Southwark county court. Kindly let us know as to this, because otherwise we are instructed to commence arbitration proceedings.

I cannot help thinking that that course of action suggested itself to the plaintiff's solicitors because of their earlier acquaintance with litigation of this nature. I think it was an attempt to place the defendants or the employers in a position of great difficulty. I do not see how they could be expected to pay what the plaintiff's solicitors described as the proper amount into the Southwark county court, because I think there would have been great difficulty, on the information they had, in determining what was the right amount. There was no claim for compensation by the widow ; there was a claim made for compensation for the two children, whose ages were stated ; but, so far as I know, there was not much other information that the employers or their solicitors had on which to base any calculation of compensation. The next step was that, on Nov. 29, an application was filed by the plaintiff's solicitors, claiming compensation for the children, and they gave as particulars :

(i) Dorothy May Taylor, of no occupation, daughter of the deceased, partly dependent to the extent of 5s. per week ; (ii) Eric William Taylor, of the same address, born Apr. 12, 1924, schoolboy, son of the deceased, wholly dependent.

Para. 11 of the statutory form of application is as follows :

Particulars as to any persons claiming or who may be entitled to claim to be dependants, but as to whose claim a question arises, and who are therefore made respondents, with their names, addresses, and descriptions and occupations, if any.

That is answered, "None." Now, there was a widow, and in this action which is before me she is contending that she is the worse off by the death of her husband, and I think, from what took place before the learned county court judge, that she was a dependant within the meaning of the Workmen's Compensation Act; but she preferred, or her advisers preferred, that she should be treated otherwise, and they answered para. 11 of the application, or caused it to be answered, "None."

Then it is important to look at the Workmen's Compensation Procedure Rules, 1926, r. 4:

(1) An application on behalf of the dependants of a deceased workman for the settlement by arbitration of the amount payable as compensation to such dependants may be made by the legal personal representative, if any, of the deceased workman on behalf of such dependants, or by the dependants themselves; and in either case the particulars to be filed as hereinafter mentioned shall contain particulars as to the dependants on whose behalf the application is made.

Rule 4 (2) was to the following effect:

Provided, that if there is any conflict of interest between the dependants themselves, or if any dependants neglect or refuse to join in an application, the application may be made by or on behalf of some only of such dependants, the other dependants in either case being named as respondents.

The natural meaning of that sub-rule is that, if a party bringing proceedings in respect of, or for, some other dependants, knows that other dependants neglect or refuse to join in an application, they shall be named as respondents. Now, the solicitors acting in the arbitration did not name the widow as a respondent. I ought to say that the same firm of solicitors, the writers of the letter of Nov. 15, 1935, was acting for the children in the arbitration proceedings under the Workmen's Compensation Act, and is acting for the widow in this action, and, so far as I know, this firm has always been acting for both—for all. This firm did not name the widow as a respondent, whereupon the respondents to that arbitration, the defendants in the present case, by their answer set out:

(1) The respondents have admitted liability to pay compensation, in accordance with the provisions of the Act, to such persons as shall hereafter be proved to have been wholly or in part dependent on the deceased workman at the time of his death. (2) The present claim purports to be made on behalf of two infants, who are alleged to have been dependent on the deceased workman at the time of his death. (3) The workman left at his death a widow, now residing at 49, Old Road, Clacton-on-Sea, who has expressed her intention of taking other proceedings. (4) The widow, although she has neglected or refused to join in this application, has not been named as a respondent to this application in accordance with the Workmen's Compensation Rules, 1926, r. 4 (2). And take notice that the respondents will apply on the hearing of the arbitration for an order that the same shall stand adjourned until such time as all necessary parties are before the court and for any consequential directions.

The arbitration proceedings were taken in the name of or by the next friend, Thomas John Taylor, who was the uncle of the children, I am told. The answer of the respondents, to which I have referred, was filed on Jan. 10, 1936, and the application came on for hearing before His Honour JUDGE CRAWFORD on Jan. 23, 1936, in the Southwark county court.

Mr. Pugh, on behalf of the respondents to that application, applied that the widow should be made a respondent. I have before me a copy of the notes of the learned county court judge, and it appears that Mr. Baker appeared as counsel for the applicants, Mr. Pugh as counsel for the respondents, and Mr. Scott Duckers, who, or whose firm, was instructing Mr. Baker, watched the case for the widow; and the first, indeed I think the only, witness called before the learned county court judge was the widow, the plaintiff in this action, Florence Taylor. She gave evidence of her position as widow, and evidence as to the children of the marriage, whom she mentioned, and she was cross-examined, and towards the end of her evidence she was asked a question or two with regard to her solicitor's letter of Nov. 15, 1935. Now, it is important to notice that, up to that time, she was not a party to the proceedings before the learned county court judge. She was asked this:

(Q.) Do you propose taking proceedings in another court to recover damages in respect of the death of your husband?

(A.) Yes.

(Q.) Do you give up any claim to compensation under the Workmen's Compensation Act?

(A.) In this matter, I will rely on the advice given to me by my legal advisers.

After that, the case for the applicants, that is, the children, was closed.

Then Mr. Pugh made his submission with regard to r. 4 (2), Mr. Baker cited authorities, and Mr. Scott Duckers was allowed to refer to the Workmen's Compensation Act, 1925, s. 29.

The learned county court judge's note then proceeds:

I make Mrs. Florence Taylor a respondent for the reasons and the terms and conditions set out in "J.D.C.A." Mr. Scott Duckers, appearing for the said Florence Taylor, now added as respondent, states that the respondent, the said Florence Taylor, does not ask for any award for compensation in these proceedings, but reserves her right to proceed independently of the Workmen's Compensation Act, 1925, s. 29, or otherwise. Mrs. Taylor, having been asked by me, states that she approves.

The exhibit "A" attached to the learned judge's notes reads as follows:

Mrs. Florence Taylor having proved upon the hearing of this arbitration that she is a dependant of the deceased workman, William Nicholson Taylor: It further appearing that the said Florence Taylor is not a party to the proceedings brought by Dorothy May Taylor and Eric William Taylor, the children of the said William Nicholson Taylor, claiming compensation under the Workmen's Compensation Act as the dependants of the said William Nicholson Taylor: And the said Florence Taylor not consenting to be made a respondent to the said arbitration: I find that the said Florence Taylor has neglected and/or refused to join in the said application for arbitration: I hold that by the terms of the Workmen's Compensation Rules, 1926, r. 4 (2), I am bound to make the said Florence Taylor a respondent, and I accordingly so order. I further order—and the same is an essential part of the order making her a respondent—that such order does not in any way prejudice such rights (if any) as she may have to recover damages under Lord Campbell's Act in respect of the death of the said William Nicholson Taylor, or her right (if any) to recover compensation under the Workmen's Compensation Act in respect of the death of the said William Nicholson Taylor.

With regard to the last paragraph of that, I am not sure that it can have any effect at all. The order which the learned county court judge makes either has some effect upon the rights of the plaintiff in this

action or it has not, and I do not think that the order of his, even though it is said that it shall not in any way prejudice such rights as she may have, can be limited in that way, if the effect of the making of the order is in law to limit those rights : in other words, if the result of that which

A is done in the county court is to prevent the plaintiff recovering in this action in the High Court, then the insertion of that paragraph in the learned county court judge's note or judgment can be taken to preserve her rights. The question is what is the effect of it in law. This is clear, that the plaintiff was added as a respondent to the proceedings in the B county court without her consent. The note of the learned county court judge so states :

and the said Florence Taylor not consenting to be made a respondent to the said arbitration.

It is further clear from that which the solicitor who was watching the C proceedings on her behalf said that she reserved any right which she had to proceed independently, and that she was not asking for an award of compensation in those proceedings, and it is further clear that she said in answer to a question before the learned county court judge that she proposed to take proceedings in another court to recover damages in D respect of the death of her husband.

The determination of the question before me depends upon statutory provision, but I ought to add before going to that that this action was commenced on Feb. 11, 1936, that is, some fortnight or three weeks after the hearing in the county court and a few days within six months from the E date of the accident which resulted in the death of the plaintiff's husband. It is now necessary to consider the Workmen's Compensation Act, 1925, s. 29 (1) :

When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case F the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

G The provision that :

the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act—

does not arise in so many words at this moment, because, if I understand the position correctly, the learned county court judge did not order that H any particular sum as compensation be paid to one of the children whom he determined to be a dependant within the meaning of the Workmen's Compensation Act : he adjourned the proceedings, on the ground that he could not fix the amount because he was not certain what the position of the widow was, in other words, what the total sum available as com-

compensation would be. So the proceedings before him stand adjourned, nothing has been paid by the respondents by way of compensation, though it is possible, indeed likely, that something may be paid in a certain event.

Sect. 29 (2) provides :

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If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed ; but the court in which the action is tried, or, if the determination is the determination (on an appeal by either party) by an appellate tribunal, that tribunal, shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

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I draw attention to that subsection, because, should the plaintiff be allowed to proceed with this action, and should she fail to establish that which she sets out to establish, she may still recover compensation under that section, with the proviso that the case in certain events, by an appellate tribunal at least, may be remitted to the county court for the assessment of compensation. Equally, if the children had been made parties to this action, and the claim of the plaintiff and of the children had failed, the children could have been awarded compensation under that section. The position which might arise was pointed out to me by Mr. Pugh in this way : if the plaintiff is allowed to proceed with this action, if she succeeds she will be awarded a sum as damages. What, then, is the position of those dependants who are, or of that one, I think it is, dependant who is, waiting for the learned county court judge to say the amount of compensation due to him or her in the county court under the Workmen's Compensation Act ? Again, if the plaintiff should fail and should ask for an award of compensation by reason of sect. 29 (2), there might be in those circumstances an assessment of compensation by two different judges, one a High Court judge acting under that subsection, and the other the county court judge, who already has acted, at least to some extent, and who has adjourned the county court proceedings. I have no doubt that all these difficulties were foreseen when this method of litigating these matters or this matter was entered upon. I find it difficult to think that it is in the interests either of the widow or of the children, but all I have to decide is what is the legal position on those paragraphs of the defence which raise this point and which is before me for decision.

Now, Mr. Pugh submitted that the dependants have exercised their option under the Workmen's Compensation Act, 1925, s. 29. I will read the material words again :

But in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act.

Mr. Pugh's first point is that, proceedings having been taken, under the Workmen's Compensation Act, on behalf of the children, and by the same solicitor who is the writer of the letter of Nov. 15, 1935, and who is the solicitor acting for the plaintiff in these proceedings, that must be regarded as an exercise of the option of the dependants under sect. 29, an exercise of their option to claim compensation under the Act. I ought to say that, by the interpretation section, sect. 48 (3), it is provided that :

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom or for whose benefit compensation is payable.

Mr. Pugh submits then that I ought to read the section as meaning that the dependants may, at their option, either claim compensation under this Act, or take proceedings independently of this Act, and that they have taken proceedings under the Act, and that consequently this action is barred. On what amounts to the exercise of an option he referred me to the well known case of *Scarfe v. Jardine* (1), and in particular to the opinion of LORD BLACKBURN, at pp. 360, 361, in that report. Secondly, he submitted that the action under the Fatal Accidents Act, 1846, is really an action which is brought for the benefit of the children and other dependants, that she, the plaintiff, cannot bring or continue such an action now, because she cannot bring it for the benefit of the children, and he referred me to the precise wording of the Fatal Accidents Act, 1846, s. 2 :

Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused—

and also to the wording of the preamble to the Fatal Accidents Act, 1864.

His third submission was that, if the plaintiff is allowed to proceed in this action, and if she succeeds, the absurd position would arise that she deprives the child, who is held by the learned county court judge to be a dependant, of the compensation to which that child would otherwise be entitled.

Now, I am satisfied that all those three submissions fail. The first one has already been considered by the House of Lords and by other courts, and I was referred to several authorities, all of which, or most of which, arise under earlier statutory provision, which is in the same terms as sect. 29 (1) of the Act. The first case to which I need refer is *Codling v. John Mowlem & Co., Ltd.* (2) :

The plaintiff, who was the widow of a workman killed by accident arising out of and in the course of his employment, brought an action under the Fatal Accidents Act, 1846, against the defendants, who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that the deceased workman left as dependants the plaintiff and six children ; that all the dependants except the plaintiff had claimed under the Workmen's Compensation Act, 1906, against the defendants, and that an award had been made apportioning the total sum of £300 equally between the children. The defendants by their

defence, after denying the alleged negligence, pleaded that the plaintiff had by letters from her solicitor made a claim on them on behalf of herself and her children for compensation in respect of the death of her husband; that the defendants, having by letter admitted liability under the Workmen's Compensation Act, 1906, had paid into the county court the maximum amount payable under the Act, namely, £300; that the children by their next friend had applied to the county court for an order for the investment and allotment of the sum of £300 between the dependants, and that the county court judge by his award had allotted £50 to each of the children and directed that £45 out of each sum of £50 should be invested, and that out of the residue the sum of 18 shillings a week together with the interest on the invested money should be paid to the plaintiff for the benefit of the children; that the plaintiff throughout was cognizant of the fact and approved of and concurred in the application and attended the hearing and thereat renounced her rights and interest in the sum of £300 in favour of her children, and that the award was made with her consent. The defence stated that the defendants would therefore contend that this action was barred and was not maintainable by reason of the provisions of the Workmen's Compensation Act, 1906, s. 1 (2) (b). It appeared that in the application for allotment the next friend named the plaintiff as a dependant, but applied for a division among the children only and expressly stated that the plaintiff did not claim under the Act of 1906. An order having been made in chambers for the decision in the first instance of the point of law raised on the pleadings:—HELD: that on the facts as stated the plaintiff had made herself a party to the claim for compensation under the Workmen's Compensation Act, 1906, and was therefore precluded by sect. 1 (2) (b) from claiming damages against the defendants independently of the Act. Judgment of ATKIN, J., affirmed.

But when one looks at the context one finds that ATKIN, J., as he then was, declined to hold as a matter of law that the plaintiff had elected to pursue her remedy under the Workmen's Compensation Act, 1906, the question of election being primarily one of fact, and he held that the defendants, having paid compensation under the Act of 1906, were not liable to pay damage independently of that Act, and he accordingly decided the point of law in favour of the defendants.

It will be observed, from what I have said already, that the decision of the Court of Appeal was based on the ground that the plaintiff had made herself a party to the claim for compensation under the Workmen's Compensation Act, and was, therefore, precluded from taking proceedings independently of that Act, and it is clear, when the facts of that case are examined, that she was present at the hearing, and that she was consenting to that which was done. She knew that the total amount of compensation payable under the Workmen's Compensation Act, 1906, was £300, that that total amount was paid by the respondents, and she agreed to its division among her children. BUCKLEY, L.J., in the Court of Appeal in that case, having referred to the Workmen's Compensation Act, 1906, s. 13, went on to say, at p. 1061:

The workman here is dead, and I am, in those circumstances, bound to read sect. 1 (2) (b), as if the word "dependants" were substituted for "workman." Reading it thus, it runs in this way: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the dependants may, at their option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." I

recognise, as has been suggested during the course of the argument, that many difficult questions might arise under that clause. For instance, if there are, as here, seven dependants, what is meant by the words "may at their option"? Do the words mean that the dependants must be unanimous in the exercise of their option, or is the majority to prevail; or has each one of the dependants individually an option? Inasmuch as the option is to do one of two things, the exercise of the option one way must exclude its exercise the other way. If some of the dependants take one course and some the other, there is no option exercised by the dependants as a body at all. Those are difficulties which will have to be faced when they arise. They do not arise in this case.

They did not arise in that case because the plaintiff in the action was a party to, and consented to, the proceedings which had taken place in the county court, under the Workmen's Compensation Act, and she was held to be debarred from proceedings at common law, not for the precise reasons which ATKIN, J., as he then was, gave.

Now, that case was considered in the House of Lords, in the year 1931, in the case of *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3), a case which deals with sect. 29 of the Act of 1925:

Sect. 29 (1) of the Workmen's Compensation Act, 1925, provides that where the injury was caused by the negligence of the employer, "nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . ." Sect. 48 (3) enacts that any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants. After an action of damages under the common law of Scotland had been brought against a colliery company by the widow of a miner who had been killed in the pit, on behalf of herself and children, a stepson of the deceased (who had no claim at common law) presented an application for compensation under the Workmen's Compensation Act, 1925. In that process the company paid into court the maximum amount payable under the Act, and the arbitrator awarded the stepson compensation. In their defences to the common law action the company pleaded that the defenders having paid into court the maximum compensation payable under the Workmen's Compensation Act, 1925, and not being liable to proceedings independently of said Act, the present action was incompetent:—HELD: that the option of the widow either to claim compensation under the Act or to take proceedings independently of it could not be defeated by the arbitration proceedings taken by the stepson, and that the action was competent.

And it is to be observed that, unless that is so, any dependant, to whatever small extent, who made a claim, or presented a claim, or an application, for compensation under the Workmen's Compensation Act could bar completely an action by relatives at common law; for, if it is to be said that, immediately one dependant makes a claim under the Workmen's Compensation Act, the employers can pay into a county court the total sum for which they may be responsible, namely £600 at the most, if the argument put forward in the case to which I am referring is right, the claim plus the payment into court, the county court under the Workmen's Compensation Act, would act as a bar to a claim which might amount to many times that amount of compensation—it might do so. In that case, I was referred to the speech of LORD BUCKMASTER

and that of VISCOUNT DUNEDIN, and in particular to that of LORD THANKERTON, at pp. 588, 589 :

The appellant maintains that, whether the workman is alive or dead, there is only one option provided for by the section, and that the employer's whole liability must be either under the Act alone, or entirely independently of the Act. In other words, when the workman is dead, the option is that of a class, and the definite exercise of that option by one or more members of the class exhausts the right of choice of the class and of all those who compose the class. It is not really material to this question that in the present case the stepson has obtained the whole of the lump sum compensation, though it may illustrate a possible hardship. But a consequence of the construction maintained by the appellant would be, for instance, that one member of the class, who has no right of action independently of the Act, can deprive the remaining members of the class of their independent rights of action, however well justified and valuable those rights may be. In my opinion such a result would render nugatory the express provision of the section that nothing in the Act "shall affect any civil liability of the employer." The right of the respondent to sue the present action is a right arising to the respondent herself as an individual and on behalf of her two pupil children, and is not derived from her deceased husband ; these are three independent rights of action, and I am unable to read the words "any civil liability" otherwise than as referring to such rights separately. I am therefore of opinion that each person, who is entitled to compensation under the Act on the death of the workman and who has also a right of action independently of the Act, has an individual option under sect. 29 (1).

The same was the view of LORD RUSSELL OF KILLOWEN.

As I have said, the case of *Codling v. John Mowlem & Co., Ltd.* (2) is referred to in that case in the House of Lords, and the dictum of LORD ATKIN in the court of first instance in *Codling's* case (2) was not approved, but their Lordships gave their reason why the decision in *Codling's* case (2) was right—the reasons which were given in the Court of Appeal.

Now, it seems to me that the decision to which I have just referred covers this case, and disposes of the first submission of Mr. Pugh ; but he argued that it was not completely in point. He said in *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3) there was a stepson, and the position was not the same as when you have a widow and her children, acting through the same solicitor, taking these separate proceedings. Now, I do not think it is possible to say that the fact that the same solicitor is acting for both means that both exercise the same option, or that both can be said to exercise an option, particularly when one is saying, both through the solicitor and by her own mouth, "I am not exercising an option under the Workmen's Compensation Act, I intend to pursue my remedies elsewhere," and that was her position. For those reasons, I think Mr. Pugh's first point fails. I am unable to find that, either in law or in fact, the plaintiff in this action has exercised an option to claim compensation under the Act.

As to the second point, it is submitted by Mr. Pugh that the action under Lord Campbell's Act is really an action which is brought for the benefit of children and dependants generally, and that she cannot continue this action, or an action of this character, because she cannot bring it for the benefit of the children. In the view which I hold, it is open to

her, as widow, to bring the action on her own behalf, as she is doing, and I do not think that her position is any the worse because her children do not join with her, or because she is not in a position to join them. The words of LORD THANKERTON, which I read a moment ago, referred
A to the right arising to the respondent herself as an individual and on behalf of her two pupil children. I think, under the relevant statutes, there is a right in her to bring proceedings on her own behalf, as there also is a right, in ordinary circumstances, for her to bring proceedings on behalf of her infant children. I cannot say that she has no right
B under those statutes, because she is not in a position to join her children in this action, or, rather, to bring the action on their behalf as well as on her own.

The third point which Mr. Pugh takes is that, if she is allowed to proceed with this action, and proceeds, an absurd position arises, in
C that she deprives the children of compensation. The learned county court judge found that one of the children was dependent, and would in certain events be entitled to some compensation. Mr. Pugh's argument on that is based on the Workmen's Compensation Act, 1925, s. 8 (3) (ii):

D If the widow or other member of the workman's family and such child or children as aforesaid, or any of them, were partially dependent on the workman's earnings, the children's allowance shall be such proportion of the sum which would have been payable under the foregoing rule if all such persons had been wholly dependent as may be agreed upon or in default of agreement as may, taking into consideration the amount of the lump sum, be determined by arbitration under this Act to be reasonable.

E I am not sure that it is right to say that, unless and until there is something fixed for the widow, there can be nothing fixed for the other dependants. I do not take that view of the section, though it is unnecessary for me to go into the matter. I do not think, myself, that any
F award of damages to the plaintiff in this action, if she succeeds, would have the effect of depriving the child of compensation. The learned county court judge has decided that the child is entitled to compensation. It may have been advisable to reserve the amount until later, and that he has done. What does seem to raise more difficulty is the position
G which may arise if the plaintiff fails, and the High Court judge is asked to deal with the compensation. But, in the result, I am satisfied that the argument of Mr. Baker in reply is right, that there is no exercise of an option by the widow in this case. It is not the class which is being dealt with. She is the plaintiff in this action, she has not exercised
H an option, there is nothing in the facts of this case otherwise to cause me to say that she ought to be prevented from pursuing this action. What the result of this action will be is no concern of mine. I know nothing of the facts; they have not been before me. I am indebted to both the learned counsel for their complete argument upon the matter,

and I have thought it better to deal with it to-day, rather than to put my judgment into form, which might have been more satisfactory.

I desire to say this, which I have indicated already, I think it is very much to be regretted that this course of procedure was entered upon. The result of it is that, though the death took place on Aug. 16, 1935, **A** this action is only in its preliminary stages. In the county court proceedings, the learned county court judge thought it right not to fix the amount of compensation pending these proceedings, or for some other reason, so that no one even has any compensation. I think it would be better if the county court proceedings had been adjourned, at least for **B** a period, to see whether this action was to be brought, and if it was brought it would have been better that the county court proceedings should be adjourned further; but that course was not taken. By reason of what has taken place, no one has got any compensation as yet, and the plaintiff, though she has a decision on a preliminary point in her favour, **C** is a long way from getting any judgment. Whether she will get a judgment or not I do not know. I can well understand that, in some cases, there may be a difference of interest between widow and children. I have no reason to think that there is any in this case, and I cannot help thinking that the form in which the proceedings have been put forward **D** has been one which has tended rather to cause difficulties to the defendants than to help the dependants, if there are dependants. It may be that, in some cases, that course of procedure results in defendants paying, rather than incurring, frequent costs, or heavy costs. As to that, I know nothing; but I have thought it my duty to say this, because I **E** believe it to be the effort and the desire of every judge to cut down legal expenses as much as possible in the interests of parties, and I should have liked to see more of that in this case. The preliminary point is decided in favour of the plaintiff.

Solicitors: *Scott Duckers & Co.* (for the plaintiff); *Carpenters* (for the **F** defendants).

Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.

Re GARNER MOTORS, LTD.

[CHANCERY DIVISION (Crossman, J.), **December 15, 16, 17, 1936,**
January 28, 29, 1937.]

A *Companies—Scheme of arrangement—Release of joint debtor—No reservation of creditors' rights against joint debtors—Companies Act, 1929 (c. 23), s. 153.*

Contract—Joint debtors—Release of one—Release by operation of law—Effect of.

B S. W. W., Ltd., and G. M., Ltd., became jointly liable to the applicant company upon a certain contract. S. W. W., Ltd., then entered into a scheme of arrangement with its creditors, which was sanctioned by the court under the Companies Act, 1929, s. 153, and which provided that the unsecured creditors of S. W. W., Ltd., should accept the provisions in their favour contained in the scheme in full satisfaction and discharge of their claims against S. W. W., Ltd., and the assets thereof. The applicant company duly received the cash and shares to which it was entitled under the scheme and signed a receipt "on account of the joint indebtedness to us of S. W. W., Ltd., and G. M., Ltd." **C** G. M., Ltd., claimed that the scheme of arrangement entered into by S. W. W., Ltd., had the effect of releasing G. M., Ltd., from its liability under the contract :—

D HELD : (i) the effect of the Companies Act, 1929, s. 153 (2), is to give to a scheme of arrangement, when sanctioned by the court under that subsection, a statutory operation.

(ii) as a discharge of one of several joint debtors by operation of law does not release the other joint debtors, the discharge of S. W. W., Ltd., effected by the scheme of arrangement, did not release G. M., Ltd., from its joint liability in respect of the debt.

E (iii) it is unnecessary to insert in a scheme of arrangement which is to be sanctioned by the court under the Companies Act, 1929, s. 153, a reservation of the rights of the creditors against a person jointly liable with the company.

F [EDITORIAL NOTE. A joint debtor is often released from his obligations by the release of the other debtor ; but this is not the effect where such a release is by operation of law. The decision here is that a release by a scheme of arrangement under Companies Act, 1929, s. 153 (2) is a release by operation of law and therefore another joint debtor is not released by the sanctioning of such a scheme by the court.

G AS TO RELEASE OF JOINT DEBTORS, see HALSBURY, Hailsham Edn., Vol. 7, p. 252 ; para. 346 ; and FOR CASES, see DIGEST, Vol. 12, pp. 510, 511, Nos. 4200-4220.]

Cases referred to :

- H** (1) *Dane v. Mortgage Insurance Corpn.*, [1894] 1 Q.B. 54 ; 10 Digest 1054, 7372.
 (2) *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540 ; 10 Digest 1055, 7379.
 (3) *Re Jacobs, Ex p. Jacobs* (1875), 10 Ch. App. 211 ; 5 Digest 1070, 8761.
 (4) *Slater v. Jones, Capes v. Ball* (1873), L.R. 8 Exch. 186 ; 5 Digest 1176, 9514.
 (5) *Re Hatton* (1872), 7 Ch. App. 723 ; 5 Digest 1115, 9088.
 (6) *Re A Debtor*, [1901] 2 K. B. 354 ; 4 Digest 168, 1575.
 (7) *Andrew v. Macklin* (1865), 6 B. & S. 201 ; 5 Digest 1191, 9621.

- (8) *Megrath v. Gray, Gray v. Megrath* (1874), L.R. 9 C.P. 216 ; 5 Digest 1057, 8640.
- (9) *Re Taylor & Rumboll, Ex p. Rumboll* (1871), 6 Ch. App. 842 ; 5 Digest 1057, 8641.
- (10) *Re Sandwell Park Colliery Co., Ltd.*, [1914] 1 Ch. 589 ; 10 Digest 1054, 7369. A

APPLICATION by Temple Press, Ltd., asking that the decision of the joint liquidators of Garner Motors, Ltd., rejecting the proof of the debt of Temple Press, Ltd., amounting to £379 5s. 10d., might be reversed, and proof of the said debt allowed in full. The debt was alleged to have been incurred in relation to a contract for the insertion of advertisements in *The Commercial Motor*, and made between Temple Press, Ltd., and a company called "Sentinel" Waggon Works, Ltd., and Garner Motors, Ltd., jointly, or with those two companies jointly and severally. The liquidators rejected the proof on the ground, *inter alia*, that Garner Motors, Ltd., was discharged by virtue of a scheme of arrangement entered into by "Sentinel" Waggon Works, Ltd., and sanctioned by the court under the provisions of the Companies Act, 1929, s. 153. Under the provisions of that scheme of arrangement, a new company was to be formed, with the object *inter alia* of acquiring and undertaking all or any of the assets and liabilities of "Sentinel" Waggon Works, Ltd. (in the scheme called "the present company"), and by cl. 5 thereof it was provided that the unsecured creditors of "Sentinel" Waggon Works, Ltd., were to have their debts settled partly by a cash payment, and partly by income notes, to be created by the new company. It was contended by the joint liquidators of Garner Motors, Ltd., that the discharge in cl. 5 extended not only to the unsecured creditors of "Sentinel" Waggon Works, Ltd., but also to the creditors of its co-debtors, Garner Motors, Ltd. B

The Companies Act, 1929, s. 153, provides : C

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs. D

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. E

R. S. Lazarus, for the applicant company, Temple Press, Ltd. : The rights of creditors against sureties for debts of a company under a scheme of arrangement are unaffected by such a scheme : see HALSBURY'S F

LAW OF ENGLAND, Hailsham Edn., Vol 5, p. 797, *Re London Chartered Bank of Australia* (2), and *Dane v. Mortgage Insurance Corpn.* (1). See also *Re Jacobs, Ex p. Jacobs* (3), in which it was held that a creditors' resolution for a composition, under the Bankruptcy Act, 1869, s. 126, creates a discharge of the debtor by operation of law, and that such a discharge does not free a co-debtor from his liability. A scheme of arrangement under the Companies Act, 1929, s. 153, is a discharge by operation of law.

- Maurice Berkeley* for the respondents, the liquidators of Garner Motors, Ltd.: There are no authorities on sect. 153. The cases cited are decisions on sections of other Acts which are worded differently from sect. 153. But the Bankruptcy Act, 1861, s. 192, is analogous to this section, and, in the cases under that section, it has been held that a deed of assignment does operate as a release of the debtor's co-debtors: see *Slater v. Jones, Capes v. Ball* (4), and *Re Hatton* (5). Both of those cases establish the proposition that the rights of the parties depend upon the construction of the instrument of release, and that each deed must be considered by itself. That being so, the discharge contained in this scheme of arrangement is not a discharge by operation of law. All that sect. 153 does is to provide the machinery whereby an arrangement, once it has been passed by the necessary majority, and has been sanctioned by the court, shall become binding on the minority by operation of law. What the provisions of the scheme are depends upon the acts of the parties. Therefore, it can make no difference to the general rule that accord and satisfaction between a creditor and one of several debtors, who are liable jointly or jointly and severally, discharges the other debtors, unless it appears from the terms of the agreement, or the surrounding circumstances, that the creditor intended to reserve his rights against them. There is nothing to suggest such a reservation in the scheme of arrangement in the present case. See also *Re A Debtor* (6), on the authority of which I say that there has here been an accord and satisfaction of the whole debt which amounts to a discharge of both debtors.

- Lazarus*, in reply: In the cases cited, relied upon by the respondent company, the court was considering the relationship between a creditor and his debtor, and not the relationship of creditors with any co-debtor. I agree that the Bankruptcy Act, 1861, s. 192, is the nearest analogy to sect. 153, and, in *Andrew v. Macklin* (7), a case which is explained in *Megrath v. Gray, Gray v. Megrath* (8), at p. 230, which is a decision under the 1861 Act, the court rejected the suggestion that co-debtors were discharged. See also *Re Taylor & Rumboll, Ex p. Rumboll* (9), which explains the 1861 Act, at p. 848. The point is whether this scheme discharged the debtor by operation of law, or by act of the parties. The object of sect. 153 is to enable a company to make arrangements with its creditors, instead of having to go into liquidation, and, that being so,

the scheme is made binding by operation of law. The only way in which *Slater v. Jones* (4) affects this case is that KAY, J., in *Dane v. Mortgage Insurance Corpn.* (1), based his decision that a scheme of the sort we are considering here, unless it contains a provision releasing a co-debtor, was not an accord and satisfaction, on the case of *Slater v. Jones* (4). A See also *Re Sandwell Park Colliery Co., Ltd.* (10).

CROSSMAN, J. : This is an application by Temple Press, Ltd., claiming to be a creditor of Garner Motors, Ltd., Garner Motors, Ltd., being in voluntary liquidation by virtue of a resolution passed June 5, 1935. B The application of Temple Press, Ltd., is that the decision of the joint liquidators of Garner Motors, Ltd., rejecting the proof of the debt of Temple Press, Ltd., for £379 5s. 10d., may be reversed, and the said proof may be allowed in full. Temple Press, Ltd., claims that, under an order dated Oct. 9, 1934, for the insertion of advertisements in its C publication, which is called *The Commercial Motor*, and an acceptance, dated Oct. 11, 1934, Garner Motors, Ltd., and a company called "Sentinel" Waggon Works, Ltd., became jointly, or jointly and severally liable to pay to Temple Press, Ltd., the sum of £379 5s. 10d. The liquidators contend that Garner Motors, Ltd., was discharged from its D liability by the fact that, on Mar. 23, 1936, a scheme of arrangement between "Sentinel" Waggon Works, Ltd., and its creditors was sanctioned by the court under the Companies Act, 1929, s. 153. Cl. 15 of that scheme provided that :

The unsecured creditors of the present company ["Sentinel" Waggon Works, Ltd.] shall accept the provisions in their favour contained in this scheme in full satisfaction and discharge of their claims against the present company and the assets thereof. E

On May 8, 1936, Temple Press, Ltd., received the cash and shares to which it was entitled under the scheme, and, on May 14, 1936, Temple F Press, Ltd., signed a receipt for this consideration in the following form :

Received from the Shropshire Waggon Works (1936), Ltd., the sum of £94 16s. 5d., together with an income note of the nominal amount of £31 12s. 2d. on account of the joint indebtedness to us of the "Sentinel" Waggon Works, Ltd., and Garner Motors, Ltd., in the sum of £379 5s. 10d. G

The question is whether the scheme of arrangement, which was sanctioned by the order of Mar. 23, 1936, has had the effect of releasing Garner Motors, Ltd., from its liability under the contract. It is settled law, I think, that accord and satisfaction between a creditor and one of H several debtors, who are jointly and severally liable to the creditor, discharges the other debtors, unless it appears from the terms of the agreement, or the surrounding circumstances, that the creditor intended to reserve his rights against them. The law is, in my opinion, correctly

stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 7, p. 237, para. 324, which states this :

A Accord and satisfaction effected with one of several joint creditors discharges the joint debt. Accord and satisfaction between the creditor and one of several debtors who are liable jointly or jointly and severally discharges the other debtors, unless it appears from the terms of the agreement or the surrounding circumstances that the creditor intended to reserve his rights against them ; and this rule applies equally whether the obligation arises on a judgment or on any other security.

But, in my judgment, a scheme of arrangement sanctioned under the Companies Act, 1929, s. 153, does not have this effect. In my judgment, the law on this point is correctly stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 5, p. 797. After discussing, in para. 1366, "Compromises or arrangements sanctioned," and dealing with sect. 153 of the Companies Act, the following passage occurs :

C A scheme need not expressly reserve the rights of any creditors against sureties for debts of the company, as such rights are unaffected by a scheme.

A large number of cases is referred to in support of that statement, and I have had the advantage of having these cases dealt with very fully by Mr. Berkeley, and I agree with him that I do not feel that any of these cases is a direct authority for that proposition. But I think, on principle, that that proposition is right, and correctly states the law. I think the statement in HALSBURY which I have read is supported, though I do not think the case is a direct authority for it, by the judgment of KAY, L.J., in *Dane v. Mortgage Insurance Corporation* (1). In my judgment, a discharge of one of several joint debtors by operation of law does not release the other joint debtors. That, I think, is practically settled law, and I think Mr. Berkeley accepts that view of the law. In my judgment, the effect of the words in the Companies Act, 1929, s. 153 (2), is to give the scheme, when sanctioned by the court under that subsection, a statutory operation. It becomes something quite different, in my judgment, from a mere agreement signed by all the necessary parties. It has a statutory operation, and becomes a statutory scheme. So that the discharge of "Sentinel" Waggon Works, Ltd., which was effected under cl. 15 of the scheme, does not, in my judgment, have the effect of releasing Garner Motors, Ltd., from its joint liability in respect of this debt. It is unnecessary, in my view, and this view is in accordance with the statement in BUCKLEY'S COMPANIES ACTS, 11th Edn., p. 322, in the notes on this sect. 153, to insert, in a scheme which is to be sanctioned under sect. 153, a reservation of the rights of the creditors against a person jointly liable with the company. I find this passage in BUCKLEY, pp. 321, 322 :

And the court has no jurisdiction, where the company is not in liquidation, to grant a stay of execution on a judgment obtained by a creditor pending the holding of meetings convened for considering an arrangement under this section, unless a petition for winding up has been presented, when the stay can be granted under sect. 172. It is unnecessary to insert in the scheme a reservation of rights against

persons who are sureties for the company's debts or words staying proceedings by creditors or discharging contributories from liability.

I do not quote that as an authority, but merely as giving what I think is a correct statement of the law. In my judgment, therefore, the scheme which provides that :

A

The unsecured creditors of the present company shall accept the provisions in their favour contained in this scheme in full satisfaction and discharge of all their claims against the present company and the assets thereof—

did not release Garner Motors, Ltd., which was jointly liable with the company which was being released, by that cl. 15, from its liability.

B

Solicitors : *Heywood & Ram* (for the applicant company) ; *Constant & Constant* (for the respondents).

[Reported by C. M. YOUNG, Barrister-at-Law.]

C

ROBERT ADDIE & SONS COLLIERIES, LTD. v. McALLISTER. BURNS v. GARSCUBE COLLIERY CO., LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Alness and Lord Maugham), **December 8, 10, 1936, February 8, 1937.**]

D

Workmen's Compensation—Reference to medical referee—Report that workman wholly recovered from injury by accident but unfit for ordinary work—Further reference to referee as to whether condition attributable to accident—Report that condition not attributable to accident—Whether arbitrator justified in ending compensation—Workmen's Compensation Act, 1925 (c. 84), s. 19 (2), (3), (4).

E

A workman sustained injury to his back on Oct. 27, 1932, in an accident arising out of and in the course of his employment and thereafter, by agreement, he was paid compensation as for total incapacity. In Jan., 1936, the employers were advised that the workman had wholly recovered from the injury and had become fit for his ordinary work. This was disputed by the workman, and the employers applied for a reference to a medical referee, which was allowed by the sheriff clerk depute. The latter prepared an order of reference, on the prescribed form, from which he deleted the question as to whether, or to what extent, the incapacity was due to the accident. The medical referee found that the workman had wholly recovered from his injury by accident, but was quite unfit for his ordinary work or for any work except the lightest. An arbitrator remitted the matter back to the referee, for the purpose of ascertaining whether the existing unfitness was attributable to the accident. Without further examination, the referee reported that the said unfitness was not attributable to the accident, whereupon the arbitrator terminated the payment of compensation. On appeal by case stated, the first division of the Court of Session held that the arbitrator was not entitled to hold that the claimant had wholly recovered from his injury by accident and to end his right to compensation, and was bound to refuse to end compensation, and that the omission to include, in the reference to the medical referee, the question as to whether, or to what extent, the incapacity of the claimant was due to the accident, confined the duties of the medical referee to considering the condition of the work-

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man, and his fitness for employment, and excluded any report by him as to whether the incapacity was attributable to the accident. Thereupon this appeal was brought. The same question was raised in both appeals :—

A HELD : as the prescribed form of the reference included the question whether the workman had wholly or partially recovered from the injury by accident, and as, in the application for a reference, the question of the workman's recovery was expressly stated to be in dispute, the arbitrator was justified, on the referee's certificate of complete recovery, in terminating the payment of compensation.

[EDITORIAL NOTE. This case explains the decision of the House in *Archibald Russell, Ltd. v. McNeilly* (1). Where a reference is made to the medical referee the parties may refer to him the question of the existence of incapacity or the question of the cause of the incapacity or both. The certificate of the referee can only be binding and final between the parties so long as its findings are within the terms of reference. Thus, if the question of the incapacity is agreed or admitted between the parties, the referee can only be asked whether the incapacity is the result of the accident, and only his finding on that point will be binding upon the parties. C He may, of course, be asked as to both points, then his findings on both questions are binding. There are two distinct topics of reference, and, if the parties desire both topics to be referred, it must be made clear that the parties are disagreed upon both questions and that they desire both questions to be referred and decided.

D AS TO REFERENCE TO MEDICAL REFEREE, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 183, para. 394; AND FOR CASES, see DIGEST, Vol. 34, pp. 376-378, Nos. 3051-3062. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn. pp. 399, 400.]

Cases referred to :

- E (1) *Archibald Russell, Ltd. v. McNeilly* (1934), 27 B.W.C.C. 362; Digest Supp.
 (2) *Penrikyber Navigation Colliery Co., Ltd. v. Edwards*, [1933] A.C. 28; Digest Supp.
 (3) *Oliver v. United Collieries, Ltd.* [1935] S.C. 845.

F APPEALS respectively from a judgment of the first division of the Court of Session, pronounced upon an appeal at the instance of John McAllister, by way of a case stated under the provisions of the Workmen's Compensation Act, 1925, s. 49, and from a judgment of the second division of the Court of Session pronounced upon an appeal at the instance of William Burns, by way of a case stated under the provisions of the same section. The facts and the arguments in both appeals are fully set out in the judgments.

G T. D. King Murray, K.C., and James R. Marshall for Robert Addie & Sons Collieries, Ltd.

 Robert Gibson, K.C., and Edward J. Keith for the respondent, McAllister.

 Robert Gibson, K.C., and James Walker for the appellant, Burns.

H T. D. King Murray, K.C., and J. L. Clyde for Garscube Colliery Co., Ltd.

LORD ATKIN : My Lords, these two cases raise the same question as to the effect of the certificate of a medical referee where a reference has

been made to him under the provisions of the Workmen's Compensation Act, 1925, s. 19. In McAllister's case the workman, who was employed in the appellant's colliery as a brusher, had, in Oct., 1932, sustained an injury to his back by accident arising out of and in the course of his employment, and, by agreement, had been paid compensation. In Jan., 1936, the employers submitted a minute of application for reference to the medical referee, the material allegations being that :

the respondents [the employers] aver that the claimant has wholly recovered and is fit for his ordinary work, which contention the claimant denies and maintains that he is unable for any work.

In February, the sheriff clerk depute referred the matter to the medical referee, in accordance with form 4 in the appendix of the Act of Sederunt of Feb. 28, 1933. The medical referee was directed :

to examine the said claimant and give his certificate as to the condition of the said claimant, and his fitness for employment, stating whether the claimant has wholly or partially recovered from the injury by accident or scheduled disease, and specifying, if necessary, the kind of employment for which he is fit.

The words in the form :

or whether or to what extent the incapacity of the said claimant is due to the accident or scheduled disease—

were deleted in the order of reference. On Feb. 11, 1936, the medical referee gave his certificate. He set out the symptoms which he observed, and, at the conclusion, said of the claimant :

He has wholly recovered from the injury by accident, but is quite unfit for his ordinary work—

and went on to say that, unless he engaged in some light work to divert his thoughts from himself he would not improve. Upon receiving this report, the sheriff substitute remitted the case to the medical referee, to state whether the condition described " but is quite unfit," etc., was attributable to the accident. He explains that he did this to clear up any possible ambiguity in the certificate. The medical referee then made a supplementary report, in which he used the form of report provided in the appendix, but now, and for the first time, filled up the alternative 2 as follows :

2. The incapacity of the said John McAllister, stated by me in my certificate dated Feb. 11, 1936, is not attributable to the accident.

On this state of facts, the sheriff substitute terminated the compensation. On appeal by case stated, the first division of the Court of Session held that the arbitrator was not entitled to hold that the claimant had wholly recovered from his injury by accident and to end his right to compensation, and was bound to refuse to end compensation. They held that the omission to include, in the reference to the medical referee, the question expressed in the alternative 2, whether, or to what extent, the incapacity of the claimant was due to the accident, confined the duties of the medical

referee to considering the condition of the workman and his fitness for employment, and excluded any report by him as to the causation of any incapacity which he might find to exist. They arrived at this result by comparing sect. 19 (2), (3) with sect. 19 (4), and by applying the decision of this House in *Archibald Russell, Ltd. v. McNeilly* (1), and the reasons for the decision given by LORD MACMILLAN, who delivered the leading opinion.

My Lords, with great respect for the judgments in the Court of Session, I venture to think that the learned judges have put too narrow a construction on the Act, and have omitted to give sufficient consideration to the circumstance that the decision in *McNeilly's* case (1) was given upon a state of facts very different from those in the present case. *Prima facie*, it is difficult to see why the result of an adequate report as to the "condition" of a workman might not, in itself, be conclusive of his claim to receive further compensation. If, at the time of the examination, the injury has ceased to cause any wage-earning incapacity, or the possibility of its renewal, it cannot be disputed that compensation should be ended. Can it make any difference that, at the time of the examination, there was incapacity due to an independent cause, such as illness or a domestic accident? If a medical referee, asked to certify as to the condition of a man who had met with an injury to his arm, were to certify that the workman now enjoyed full and complete use of his arm, but was temporarily incapacitated from work because in the last three days he had fallen down the steps of his house and broken his leg, would not the certificate entitle the arbitrator to end compensation? The medical referee could hardly ignore the broken leg in giving a certificate as to "condition," but he would have conclusively certified that the injury by accident no longer caused any incapacity, for that represents the "condition" which he finds. The fact, therefore, that there is incapacity, due to an independent cause, cannot destroy the conclusive effect of the certificate that the injury by employment accident is no longer operating as a cause of incapacity. Subsect. (4) on the face of it appears to deal only with the case where there plainly exists incapacity, but where the workman and employer are not agreed as to whether the incapacity in whole or in part is due to "the accident." In such a case, that question can be referred to the medical referee, under subsect. (2), and in such a case the alternative reference, whether, or to what extent, the incapacity of the workman is due to the accident, is appropriate.

So far, I have considered the terms of sect. 19, without reference to the inquiry prescribed by sect. 12 as to whether the workman has recovered from the injury, and without reference to the change in the forms of reference and certificate which the authorities introduced when they first became aware, or were reminded by the judgment of VISCOUNT

DUNEDIN in *Penrikyber Navigation Colliery Co., Ltd. v. Edwards* (2), that the forms should take account of sect. 12. The case of *Archibald Russell, Ltd. v. McNeilly* (1), was decided on the forms as they existed, without reference to the question of "recovery." There the reference arose upon a joint minute of the parties, stating that the employers averred A that the workman was fit for light work so far as the accident was concerned, which contention the workman denied, and maintained that he was unable for any work, and the parties, being at variance, craved the court to refer the matter to the medical referee. The sheriff clerk included in his reference the double inquiry as to the condition of the B workman and his fitness for employment, and whether, and to what extent, the incapacity of the workman was due to the accident. The medical referee certified that there was no incapacity due to the injury, but that such as existed was due to another cause. This House took the view that such a question never had been in dispute between the parties C and should not have been referred, and that the certificate dealing with it had no valid operation. LORD MACMILLAN made it plain that the section operates only where there is a dispute between the employer and workmen or their respective medical advisers, and that, where there is agreement that there exists some incapacity due to the accident, and D the dispute is how much, a mere reference as to fitness will not entitle the referee to negative any incapacity.

But the facts in this case are far removed from those in *McNeilly's* case (1). The forms are now altered so as to introduce the question whether the workman has wholly or partially recovered from the accident. E The employers' minute of application had averred complete recovery, and the workman's denial of that allegation, and the reference to the medical referee, in accordance with the amended form, had specifically included that question. The learned Lord President has said that such a reference excludes causation. My Lords, I am unable to agree with F this statement, which I think must be due to a loyal desire to follow *McNeilly's* case (1) without sufficiently considering the difference between the two cases. If complete recovery is left to the referee, and he finds it is a fact, he necessarily excludes the injury by accident as contributing to any other incapacity. And, if he finds complete recovery, he necessarily excludes the injury as a cause of any incapacity; so the workman and the employer, in raising the question of complete recovery, indicate a dispute which involves the decision of the question whether, if there be any incapacity, it is due to the injury; for, if there be complete recovery, no incapacity can be so due. The conditions of *McNeilly's* H case (1) are now fulfilled: there is a dispute, the reference does not go beyond it, and the certificate complies with the reference. On the certificate of complete recovery, which is now conclusive, there can be only one decision open to the arbitrator, to end the compensation.

Another way of putting the case would be to say that subsect. (4) provides that the provisions of the section are to apply "subject to any regulations made by the Secretary of State," and that the regulations, incorporating the question of complete recovery into the reference and the certificate, cover the question raised by subsect. (4): but I prefer to decide the question altogether apart from the consideration of subsect. (4). For these reasons, I am of opinion that this appeal should be allowed, with costs here and in the Court of Session, and that the first question of law in the stated case should be answered in the affirmative, and the second in the negative.

In the case of Burns, the second division took the view which I have suggested above. I agree with the judgment of the majority, and I am of opinion that the appeal should be dismissed with costs. In this case, it is noteworthy that there is a joint minute of both workman and employer, containing the averment by the employer that the workman had wholly recovered, which the workman denied. The stated case further sets out the medical certificates, on behalf of employer and workman respectively, which accompanied the joint minute, and made it clear that the controversy was whether the workman had recovered from the accident, and whether, therefore, any existing incapacity was due to the accident or not. That there existed, therefore, a dispute within the principle of *McNeilly's* case (1), is incontrovertible. I will only add that in such cases as the present it is always desirable that the medical certificates adduced by either side leading up to the reference should be incorporated in the stated case, as was done by the learned arbitrator in the Burns case.

LORD THANKERTON: My Lords, I have had the privilege of considering the opinion which has just been delivered by my noble and learned friend on the Woolsack, and I desire to express my concurrence in it, but, in view of the conflict of judicial opinion in the Court of Session, I will add some observations on my own part, on three points, namely, the construction of the statute, the statutory forms, and the case of *Archibald Russell, Ltd. v. McNeilly* (1).

In the first place, it may be well to remember the place which sect. 19 occupies in the scheme of the Act of 1925. The right to compensation is provided for in sects. 1 to 7; the amount of compensation is dealt with by sects. 8 to 13; while the conditions of compensation are prescribed by sects. 14 to 20. It follows that the last-named group of sections is necessarily bound up with the preceding groups. Of the last group, sects. 14 to 17 prescribe conditions precedent to the obtaining of compensation in the first instance. We are not here concerned with these sections. Sect. 18 refers to a case where the workman is already in receipt of weekly payments, but it is not in question here. Sect. 19

relates to both the stage of the workman's first claim for compensation and the later stage when he is in receipt of a weekly payment. The last section in this group, sect. 20, is not relevant to the present question.

Both the present appeals arise on an application by the employers for the ending of a weekly payment in terms of sect. 12, and, in particular, proviso (i), in accordance with a certificate given by the medical referee in pursuance of sect. 19 of the Act. The provisions of sect. 12 first appeared in sect. 14 of the Act of 1923. The matter to be certified by the medical referee, so as to justify an application by the employers under sect. 12, is : A

(3) . . . that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident. B

It is clear that an incapacity, which is not due to the accident, is irrelevant, and that "recovery" means recovery from the incapacity due to the accident. C

Turning, now, to sect. 19, it is necessary to consider subsections. (2), (3) and (4), and it seems to me that some confusion has been caused by a failure to consider the form of these subsections. Subsect. (2) deals with the application for, and granting of, a reference by the registrar of a county court, or, in Scotland, by the sheriff-clerk of the sheriff court. Subsect. (3) contains directions to the medical referee. Subsect. (4) is not an independent provision, but, in the event set out, extends the meaning of the word "condition" as used in subsections. (2) and (3). Looking at subsect. (4), apart from judicial decisions, it appears to me clearly to assume the admitted presence of some incapacity, the causation and extent of that incapacity being alone in dispute, and that it does not relate to any other case, where the presence of some incapacity is not common ground. D

Where the workman is in receipt of a weekly payment, and there is no agreement as to the existence of some incapacity, I am unable to see any reason why a reference "as to the workman's condition or fitness for employment" under subsect. (2) alone should be given a meaning so restricted as to exclude the only relevant inquiry, viz., whether the workman has wholly or partially recovered from the incapacity due to the accident. I therefore regard the sheriff-clerk's action, in deleting the words in the form relating to subsect. (4), as quite correct, there being no agreement as to the presence of any incapacity, with its causation alone in dispute. I am further of opinion that the words of the reference actually made, viz. : E

stating whether the claimant has wholly or partially recovered from the injury by accident or scheduled disease— F

correctly and clearly submit the question of causation to the medical referee, and that, if he finds, on his examination, that the workman has G

H

wholly recovered from the injury by accident, although he has some incapacity otherwise caused, it is his duty to say so.

In *McNeilly's* case (1), the reference was made on a joint application, in which it was stated at p. 363 :

A in respect the minuters and respondents aver that the claimant is fit for light work so far as the accident is concerned, which contention the claimant denies and maintains that he is unable for any work, and the parties being at variance . . .

On that application, the sheriff-clerk, on Jan. 28, 1933, drew up the reference to the medical referee, which directed him to give his certificate :

B as to the condition of the said John McNeilly and his fitness for employment, specifying, if necessary, the kind of employment for which he is fit ; and whether or to what extent the incapacity of the said John McNeilly is due to the accident.

The medical referee, in his certificate, dealt with the question of causation, as he was bound to do, in view of the terms of the reference. The

C only question argued in the appeal was whether the terms of the application made it competent for the sheriff-clerk to include the question of causation. It was held in this House, affirming the decision of the second division, that, on construction, the joint minute did not disclose any dispute as to causation, but only a dispute as to whether the incapacity

D was partial or total, and that the question of causation was wrongly included in the reference. While there are some observations, in the judgment of LORD MACMILLAN, in which I concurred, on the construction of sect. 19 (2), (3), (4), of the Act, these were not essential to the judgment, and I hold myself free to reconsider them, particularly in view
E of the statutory forms which were then before this House.

The form of the minute of reference to be made by the sheriff-clerk is prescribed by Act of Sederunt, which, under sect. 49 (2), constitutes in Scotland the rules of court referred to in sect. 19 (6). The form of certificate to be given by the medical referee is prescribed by regulations
F made by the Secretary of State under sect. 19 (3).

In Nov., 1932, important alterations were made in the form of reference to a medical referee under sect. 19 of the Act (Form No. 50), prescribed by the Rules of Court in England, by an amendment dated Nov. 8, 1932 (S. R. & O., 1932, No. 910), which came into operation on
G Jan. 1, 1933. The corresponding alteration in Scotland was not made until the Act of Sederunt of Feb. 28, 1933, a month after the reference in *McNeilly's* case (1).

The form of certificate to be given by the medical referee under sect. 19 of the Act (Form C) was similarly altered by new regulations as to
H medical referees made by the Secretary of State, dated Nov. 9, 1932, for England and Wales (S. R. & O., 1932, No. 960), which came into operation on Jan. 1, 1933. In this case, similar regulations were made for Scotland on the same date (S. R. & O., 1932, No. 961).

The attention of this House was not then directed to these alterations,

and yet, if the *obiter dicta* in *McNeilly's* case (1) are to be given the effect which counsel for the workman claimed for them, it would seem that these alterations are not in conformity with the statutory provisions of sect. 19.

Form 4 of the Act of Sederunt of Mar. 16, 1926, which was still effective in Jan., 1933, directed the medical referee to examine the workman and give his certificate :

as to the condition of the said _____ and his fitness for employment, specifying if necessary the kind of employment for which he is fit.

(or)

whether and to what extent the incapacity of the said _____ is due to the B
accident.

This was amended by the Act of Sederunt of Feb. 28, 1933, under which the certificate is to be given :

as to the condition of the said claimant and his (or her) fitness for employment, stating whether the claimant has wholly or partially recovered from the injury by accident or scheduled disease and specifying if necessary the kind of employment for which he (or she) is fit

(or)

whether or to what extent the incapacity of the said claimant is due to the accident or scheduled disease.

FOOTNOTE:—In dealing with the question of recovery, if the referee finds that the workman is no longer physically incapacitated for work as a result of the accident or of the attack of the disease, but that the workman's condition is such that either (a) there is a reasonable probability of the workman becoming again incapacitated through the effects of the accident or through a recrudescence of the attack of the disease, or (b) there is, as a result of the attack, an increased susceptibility to a fresh attack of the disease, the referee should include a statement as to his findings.

The alterations on Form C of the regulations as to medical referees made by the Secretary of State on Nov. 8, 1932, are similar in their terms. The important alterations are the express inclusion of the question of recovery from the injury by accident in the first alternative, and the relative footnote as to this matter. On the construction of sect. 19 (2) of the Act, which counsel for the workman claimed to have been decided by *McNeilly's* case (1), these alterations are not warranted by the Act. I am glad to feel myself free, for the reasons already stated, to reject such a contention.

Accordingly, I concur in the motions proposed by my noble and learned friend for disposal of these appeals. C

LORD RUSSELL OF KILLOWEN : My Lords, apart from authority, I would have felt but little difficulty in deciding these appeals, notwithstanding the acute difference of opinion which has been shown to exist between the first and second divisions of the Court of Session.

The Workmen's Compensation Act, 1925, s. 19, refers to submissions by the workman to medical examination, both under sect. 17 (on the occurrence of the accident and before any compensation has become payable) and under sect. 18 (while compensation for injury by accident is

being received). It provides, by subsect. (2), that if, after a submission under either of those sections, or after the workman has been examined by a medical practitioner selected by himself . . . no agreement is come to as to the workman's condition or fitness for employment, then the
 A matter may be referred to a medical referee. Subsect. (3) provides that the medical referee shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman, and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that the certificate shall
 B be conclusive evidence as to the matters so certified. Subsect. (4) runs thus :

Where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident, the provisions of this section shall, subject to any regulations made by the Secretary of State, apply as if the question were a question as to the condition of the workman.
 C

The provisions of sect. 19 have, in the present cases, been brought into play as the sequel to a medical examination under sect. 18 : i.e., there having been caused to the workman, some time previously, a personal injury by accident arising out of and in the course of his employ-
 D ment, for which the employer had been paying compensation, the employer had required the workman to submit himself for medical examination, with a view to ending or diminishing the payment under or by virtue of sect. 12 (3) of the Act.

In such a case, the respective contentions of the employer and of the
 E workman, assuming that they are in disagreement, may assume different forms ; thus : (i) the employer might allege that the workman was no longer incapacitated in fact, while the workman alleged that he was still incapacitated ; or (ii) the employer might allege that the workman was no longer incapacitated in fact, or that, if any incapacity in fact
 F existed, it was not due to the accident, while the workman alleged that he was incapacitated in fact, and that the incapacity was due to the accident ; or (iii) it being common ground between them that incapacity, as a result of the accident, did exist, they might differ as to the degree of that incapacity ; or (iv) it being common ground that incapacity did
 G exist, the employer might allege that the incapacity was not due to the accident, while the workman alleged that it was.

Of the four examples of dispute described above, (iv) alone fits in *verbatim* with the language of sect. 19 (4), which assumes the existence of incapacity ; but it does not follow, in my opinion, that it is only in
 H the case of a reference under subsect. (4) that the medical referee may certify conclusively as to the causation of any incapacity which in fact exists. If the dispute between the parties includes in terms, or necessarily involves, the question of causation of incapacity, and that dispute is referred to a medical referee (even though the reference is expressed

to be under subsect. (2)), I can see no reason disclosed by the language of the section why the medical referee may not certify that any incapacity which exists is not due to the accident, or why his certificate should not be conclusive evidence of that matter.

To revert to the instances of forms of dispute which I have given, A
(ii) includes the question of causation, and, upon a reference under
subject. (2), the medical referee might, in my opinion, properly and
conclusively certify that the workman was incapacitated, but that his
incapacity was not due to the accident. The words "as to the work- B
man's condition" (in subsect. (2)) and the words "as to the condition
of the workman" (in subsect. (3)) are wide enough to include the
question, if it be in issue between the parties, and is agreed to be referred,
whether the condition is attributable to the accident; and I find nothing
in the section which compels me to hold that condition and causation C
are, so to speak, mutually exclusive, and that the question of causation
can be certified conclusively only on a reference under subsect. (4).

It is argued, however, that I am precluded from holding this view by
virtue of the case in this House of *Archibald Russell, Ltd. v. McNeilly*
(1). I confess that I am unable to see that that decision has, *qua* decision, D
any relevance to the matter now in debate. What the case decided
was this, and nothing more: that, since the parties had not, expressly
or otherwise, agreed to refer any question of causation to the medical
referee, the reference of that question was unwarranted, and the certi-
ficate of the medical referee upon that question was not conclusive. E
In other words, before the question as to causation can be referred to
a medical referee under sect. 19, so that his certificate shall, as to that
question, be conclusive, the question must be in issue between the
parties, and they must agree that it shall be referred to him. It is true
that, in the course of his speech, LORD MACMILLAN uses the expression
that the statute treats the topics of condition and causation as distinct, F
which is true in the sense that causation is expressly mentioned only
in subsect. (4). But I did not, and do not, understand the noble Lord
to mean that (assuming the question of causation was, in fact, in issue
between the parties, and that they agreed that it should be referred)
a certificate would be conclusive on the question of causation only if G
the case fell within the exact wording of subsect. (4), and the reference
had been expressed to be made under that subsection.

I turn now to the particular facts of the two cases in debate.

In McAllister's case, the matter in dispute between the parties was
that the employers averred that the workman had wholly recovered H
and was fit for his ordinary work, and that the workman denied that
contention, and maintained that he was unable for any work. Both
parties asked that that matter be referred to a medical referee under
sect. 19 of the Act, without specifying any particular subsection. I

read the dispute as involving two things—whether the workman had completely recovered from the injury by accident, and whether he was in fact fit for his ordinary work. The form of reference followed the later form 4 which was substituted by Act of Sederunt of Feb. 28, 1933.

- A It required the medical referee to give his certificate as to the condition of the workman and his fitness for employment :

stating whether the claimant has wholly or partially recovered from the injury by accident or scheduled disease, and specifying, if necessary, the kind of employment for which he is fit.

- B The alternative in the printed form, viz. :

or whether or to what extent the incapacity of the said claimant is due to the accident or scheduled disease—

- C was struck out. It was both inapplicable and unnecessary. It was inapplicable because it was not common ground that any incapacity in fact existed. It was unnecessary because the question of causation, if any incapacity in fact existed, was already covered by the earlier part. The medical referee certified that the workman had wholly recovered from the injury by accident, but that he was quite unfit for his ordinary work, or for any work except the lightest. His certificate was apparently filled in under para. 1, form C, Schedule, Workmen's Compensation (Medical Referees in Scotland) Regulations, 1932. Para. 2 of the form was left blank.
- D

- E My Lords, that certificate is, in my opinion, a valid certificate under sect. 19, and is conclusive upon the question which was in dispute between the parties, and which they agreed should be referred, viz., whether the workman had "wholly recovered," which, in my opinion, means, and can only mean, recovered from the injury by accident in respect of which compensation was being paid.

- F The sheriff-substitute, however, was anxious to clear up the exact meaning of the certificate, as he had known of a case in which the words "wholly recovered from the injury by accident" had been used by a medical referee as meaning only "recovered from the surgical consequences of the accident," while the incapacity which existed was still, in the opinion of the referee, one of the consequences of the accident.
- G He accordingly remitted the matter in order that the medical referee might state :

whether or not the condition described at the end of the report by the words "but is quite unfit" down to the end of the report was attributable to the accident.

- H The answer of the medical referee was in the following words :

The incapacity of the said John McAllister stated by me in my certificate dated Feb. 11, 1936, is not attributable to the accident.

This answer was given by signing another form C from which para. (1) had been struck out, and in which the opening sentence had been altered

to meet the case of its being given on the request of the sheriff-substitute, and not on the request of the parties, and without any further examination of the workman. This document, I consider, in no way affects the case. It is merely a document interpreting the medical referee's certificate of Feb. 11, 1936, which, as I have already stated, was valid and conclusive upon the question of causation of incapacity. The sheriff-substitute was, in view of it, entitled to end the workman's right to compensation as at Feb. 11, 1936. This appeal should accordingly be allowed, and the questions of law should be answered, as to the first, in the affirmative, and, as to the second, in the negative. A B

In Burns's case the accident had happened in July, 1931, and the workman was in receipt of compensation by agreement between the parties. By joint minute dated Oct. 24, 1934, the parties craved the court in terms of sect. 19 to refer to the medical referee the matter in dispute, which was thus described, viz., that the employers averred : C

that the claimant has wholly recovered and is fit for his ordinary work which contention the claimant denies, and maintains that he is unable to perform his ordinary work.

The reference (which is stated to have been made under subsect. (3), meaning, I suppose, subsect. (2)) was in the same form as in McAllister's case, viz., para. 1 of the substituted form 4. The medical referee certified that the workman : D

has in my opinion wholly recovered from the injury by accident, but is at present unfit for any work.

Except that no application was made to the medical referee to elucidate his certificate, the relevant circumstances are the same as the circumstances in McAllister's case. The sheriff-substitute ended the right to compensation as at Oct. 24, 1934 ; and the judges of the second division, following a previous judgment of the court in the case of *Oliver v. United Collieries* (3), held that he was entitled so to do. The LORD JUSTICE-CLERK dissented, as he had also done in *Oliver's* case. He was of opinion that the words "wholly recovered" in the joint minute meant "wholly recovered his capacity for work," and that therefore there was no agreement to refer any question of causation or attribution. He further said that it was the plain duty of the court : E F G

to see that the rule laid down in *McNeilly* (1) is strictly observed.

My Lords, I cannot dissociate the words "wholly recovered" in the minute from the same words as they are found in sect. 12 of the Act. The only relevant recovery is recovery from the injury by accident which gives rise to the right to compensation. That this is the recovery which is in contemplation under the Act is made clear by the express words of sect. 9 (4). The only relevant incapacity is the incapacity which is the result of the injury by accident. Incapacity unrelated to H

the injury by accident is irrelevant. Nor can I detect any rule laid down in *McNeilly's* case (1), beyond the decision that a certificate is conclusive only in regard to matters which were in dispute between the parties, and which they have agreed should be referred to the medical referee.

A For the reasons which I have endeavoured to indicate, I am of opinion that, in *McAllister's* case, the appeal should succeed, and that, in *Burns's* case, it should fail.

B LORD ALNESS : My Lords, I must own that I have experienced more difficulty than your Lordships in distinguishing the principles upon which these two cases fall to be determined from the principles upon which the case of *McNeilly* (1) was avowedly determined. Had I been sitting alone, and unaided by your Lordships' opinions, I confess that I should have taken the view of the first division in *McAllister's* case, and of the dissenting judgment of the learned LORD JUSTICE-CLERK in *Burns's* case. But, as your Lordships are all agreed that these cases are clearly distinguishable from the case of *McNeilly* (1), I am constrained to conclude that my difficulties may have been largely self-created, and, while I cannot conceal the doubt which I still entertain regarding the D matter, I do not formally dissent from the conclusions at which your Lordships have arrived.

LORD MAUGHAM : My Lords, the facts in these two appeals were found in the stated cases under the provisions of the Workmen's Compensation Act, 1925, s. 49 ; and I find it unnecessary to add anything as to those facts to what has fallen from the noble Lord on the Woolsack. Nor can I usefully add anything to what he and my noble and learned friends, LORD THANKERTON and LORD RUSSELL OF KILLOWEN, have said in regard to the relevant sections of the Act or to the authorities F to which they have referred, including, in particular, the *McNeilly* case (1). Out of respect to the learned judges from whose opinions I feel constrained to differ, I propose to give my reasons for preferring the views of LORD ANDERSON, LORD HUNTER and LORD MURRAY as to the meaning and effect of the joint minutes of application for a reference G and of the actual references to the medical referees under sect. 19 of the Act and Act of Sederunt, Mar. 16, 1926, s. 15 (2). As I understand the matter, it is, in the main, a difference of opinion on these subjects which has led to the conflicting decisions in *Oliver v. United Collieries, Ltd.* (3), and *Burns v. Garscube Colliery Co., Ltd.*, on the one side, and *Robert H Addie & Sons Collieries, Ltd. v. McAllister* on the other.

My Lords, for the sake of clearness I will take the latter case, that of *McAllister*, first. In form, the question is whether the sheriff-substitute was entitled to hold that *McAllister* (the respondent) had wholly recovered from his injury by accident, and to end his right to compensation as at

Feb. 11, 1936. But it is admitted that this question turns on the effect of the report of the medical referee, and that again turns on the question of the true construction of the reference ; for the first division has decided that the report of the medical referee was *ultra fines compromissi* in a vital particular. It is a singular circumstance that the form of reference A on which, therefore, the whole matter ultimately turns is the form 4 provided under an Act of Sederunt of Feb. 28, 1933, in substitution for a previous form 4 which had led to litigious troubles, and that the first division has, in the present case, taken a view of the true meaning and extent of a reference in the modern form 4, which is exactly opposed to B the opinion expressed by the second division in the previous case of *Oliver v. United Collieries, Ltd.* (3).

My Lords, I think I may not improperly express my regret that form 4 has been found capable of more than one meaning. It is intended to be a simple reference to a medical referee, under the Act, to examine C a claimant for compensation under the Act, and to give his certificate. The form shows that it may be used on the application of both the parties, or on the application of the claimant alone, or on the application of the employers alone. Copies of the reports of the medical practitioners by whom the claimant has been examined, according to the form, have to be D annexed. All this is very clear ; but what is to be certified as the result of the examination ? The words of the form should be exactly quoted. He must give his certificate :

as to the condition of the said claimant and his [or her] fitness for employment, stating whether the claimant has wholly or partially recovered from the injury by E accident, or scheduled disease, and specifying, if necessary, the kind of employment for which he [or she] is fit ; [or] whether or to what extent the incapacity of the said claimant is due to the accident or scheduled disease.

It is, I think, arguable that the alternative is not logically perfect, though it is quite capable, with a little alteration, such as the words seem to expect in a proper case, of dealing with any matter as to which F the decision of the referee is desired. There are, in fact, not two, but three, matters which the employer might wish to be referred, apart from the question of degree of incapacity, and apart from some details mentioned in the footnotes to the form ; namely : (i) as to whether the condition of the claimant is one of incapacity (which I shall call, for G brevity, "incapacity") ; (ii) as to whether the incapacity of a workman, assuming it to exist, is due to the accident (which I shall call "causation") ; and (iii) the matter both of incapacity and of causation ; for the employer might well be disputing both incapacity and, if it should be decided to exist, causation. If, now, we look at the words in the H form in the second alternative, it is apparent that they apply only to the second case, for they assume the incapacity. What, then, do the words in the first alternative mean ? I cannot see, myself, any reason to doubt that *prima facie* the part of the sentence which, if unaltered,

positively requires the referee to state whether the claimant has wholly or partially recovered from the injury, must bring that alternative into what I have termed the third case, i.e., it requires a certificate both as to incapacity and as to causation. The framers of the clause must have
 A thought, not, in my opinion, unreasonably, that, if the incapacity was alone doubtful, it would be quite easy to run a pen through the words "stating whether the claimant has wholly or partially recovered," etc. They cannot, I think, have framed the form in the belief that the employers would not desire, in many cases, to raise the question of
 B causation as well as that of incapacity.

Such, my Lords, in the absence of some cogent contrary reason, would be my view of the meaning of the modern form 4. I next inquire whether there is anything in the facts of this case which tends to lead to an opposite conclusion. It is suggested that we may properly look at the
 C minute of application for a reference dated Jan. 21, 1936, and may also draw an inference from the circumstance that the sheriff-clerk depute, in settling the form of reference, had deleted from the form prescribed the words of the second alternative :

(or) whether or to what extent the incapacity of the said claimant is due to the
 D accident, or scheduled disease.

I should add that your Lordships in this case have been unable to look at copies of the reports of the medical practitioners by whom the claimant had already been examined, since they are not included in the record.

The minute of application, in my opinion, so far from assisting the
 E respondent, goes far, if it is admissible, to help the appellant company. It was presented by the present appellant company, and begins by a recital of the fact that :

the said John McAllister on Oct. 27, 1932, sustained injury to his back while in the course of his employment as a brusher in Rosehall 5 Colliery—

F and that, by agreement between the parties, he has been paid compensation under the Act. So far, we have been informed of the accident in precise terms. Then come the contentions :

and in respect the minuters and respondents aver that the claimant has wholly recovered and is fit for his ordinary work, which contention the claimant denies, and
 G maintains that he is unable for any work.

In my opinion the words "the claimant has wholly recovered" plainly refer to recovery from the stated accident, the accident which alone gave rise to the payment of compensation. If this assertion were to be upheld by the medical referee, beyond doubt the right to compensation
 H must end. Are the words following, "and is fit for his ordinary work," intended to preclude a reference which required the medical referee to state whether the claimant had wholly or partially recovered from the injury by accident? If there were any doubt as to the answer, and I do not myself think there is, it would, in my judgment, be removed by

considering that the employers' liability must cease on complete recovery from the accident, even though the claimant were unable, from some other cause, to do his ordinary work. Nor can I think that the reference to sect. 19 of the Act tends to support the other view. On that point, I am content with the observations which have fallen from your Lordships. The minute of application must be construed like any other business document, and, in my view, it is not legitimate to construe it as if the present appellant company was requesting the sheriff-clerk depute so to frame the reference that the employers would be bound to go on paying compensation to an employee who had wholly recovered from the only injury by accident which he was alleged to have sustained. The other contention on the part of the respondent is capable of being briefly dealt with. The sheriff-clerk depute deleted, and, in my opinion, rightly deleted, the second alternative in the form, because it is applicable only when the incapacity of the claimant is admitted, which was plainly not the case.

My Lords, with the greatest respect for those learned judges who have thought otherwise, I am unable to come to any conclusions other than that the actual form of reference properly directed the medical referee to certify both as to incapacity and as to causation (using these shorthand phrases as above defined), that his certificate is now ascertained to be clear and to be to the effect that the claimant had wholly recovered from his injury, and that this certificate, not being *ultra fines compromissi*, is conclusive in favour of the appellant company.

Turning now to the case of *Burns v. Garscube Colliery Co., Ltd.*, it is to be noted that the stated case sets out, as it should do, the doctor's certificates on behalf of the employer and the workman, and that the former states, in the clearest language, that Burns was fit for his usual work so far as the accident was concerned, and that :

any other incapacity from which he may suffer is not due to his accident.

The doctor who was called in to examine on behalf of Burns certified otherwise. The joint minute, after stating the nature of the injury, proceeded thus :

and in respect the minuters and respondents aver that the claimant has wholly recovered and is fit for his ordinary work, which contention the claimant denies, and maintains that he is unable for his ordinary work . . .

The reference followed form 4, that is, the same form as that in *McAllister's* case, and the words of the second alternative (as in that case) were deleted by the sheriff-clerk. The report of the medical referee concluded by the statement that Burns had, in the referee's opinion, wholly recovered from the injury by accident, but was at that time unfit for any work. My Lords, I agree with the judgment of the majority, and I think this appeal should be dismissed. For the reasons given in the *McAllister* case, which are in substance those expressed by the

majority in the *Oliver* case (3), I am of opinion that the question of causation, as well as that of incapacity, was referred, and, I add, properly referred, to the medical referee, and that his certificate is conclusive.

A My Lords, I concur in the proposed motions.

First appeal allowed with costs.

Second appeal dismissed.

Solicitors : *Beveridge & Co.*, agents for *W. J. Burness, W.S.*, Edinburgh, and *J. A. McAra*, Glasgow (for the appellant company in the first appeal

B and for the respondent company in the second appeal); *Caporn & Campbell*, agents for *D. D. McCollm, S.S.C.* Edinburgh, and *Thos. Thomson, Airdrie* (for the respondent in the first appeal); *Arthur C. Dowding*, agents for *William Geddes & Co.*, Edinburgh, and *John T. Robetson, Hamilton* (for the appellant in the second appeal).

C [Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

Re GENERAL PRESERVING CO., LTD.

D [CHANCERY DIVISION (Bennett, J.), February 2, 1937.]

Companies—Private company—Balance sheet—Part of loan remitted—Agreement with directors that full loan provable in winding up—Whether release.

E The managing director of a private company lent to the company £3,400. In Mar., 1935, he agreed that of that sum £1,612 6s. 8d., being the amount of the loss incurred in the first trading year of the company, should only be repaid to him by the company while it was a going concern out of profits, but, if the company went into liquidation, the whole debt was to rank on a par with the other unsecured creditors of the company. The agreement was set out in a minute of a board meeting and accounts drawn up by the accountants to give effect to that minute were signed by the managing director and his co-director. On the assets side of the account there was a statement with respect to general profit and loss account "Net loss. £1,612 6s. 8d. less T.S. loan fund £1,612 6s. 8d.," and nothing was carried into the assets column in respect of the debit balance of the profit and loss account. The liquidator postponed the director's proof as to this sum of £1,612 6s. 8d. until all creditors had been paid in full :—

G HELD : in the absence of proof that any creditor had acted to his own detriment after having seen the balance sheet, there was no case of estoppel and the managing director was entitled to prove for the sum in question in competition with the ordinary creditors.

[EDITORIAL NOTE. In *Shaw (John) & Sons (Salford) Ltd. v. Shaw*, [1935] 2 K.B. 113, H Digest Supp., it was decided that the balance sheet of a public company was not by reason of its being signed by the directors an account stated as against them. The directors sign the balance sheet as a duty owed by the directors to the company and not as agreeing to any statement of accounts binding themselves. Here the company is a private one, and it was sought to treat the entries in the balance sheet as a release of a debt, but this contention did not find favour with the court.

AS TO RELEASE OF DEBT, see HALSBURY, Hailsham Edn., Vol. 7, p. 250, para. 344; and FOR CASES, see DIGEST, Vol. 12, pp. 498-502, Nos. 4071-4119.

APPLICATION to set aside a rejection of proof by a liquidator and for an order that the proof be allowed.

W. G. H. Cook for the applicant.

Andrew Clark for the liquidator.

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BENNETT, J.: The summons before the court is an application by Theodore Soutzos to reverse the decision of the liquidator of the General Preserving Co., Ltd., rejecting his proof of debt and for an order that his proof may be allowed and that the liquidator be ordered to pay the applicant his costs of and incident to the application.

B

The General Preserving Co., Ltd. was incorporated on Aug. 28, 1933, under the Companies Act, 1929, as a private company. It had a nominal capital of £5,000 in £1 shares, all of which were issued and fully paid. Of these shares the applicant held 4,990 and Mr. Mace held 10. The applicant is the managing director of the company, and Mr. Mace is a co-director. The company was not successful in its trading operations, and the result of the year's trading ended on Dec. 31, 1934, was that the company had made a loss of £1,612 6s. 8d. The company had been assisted financially by the applicant Mr. Soutzos, and there was owing to him by the company in the month of Mar., 1935, a sum of £3,400. That fact is not disputed and Soutzos was desirous of assisting the company—"strengthening its financial position" is the phrase that was used in one of the minutes, and in order to see what could be done he appears to have had in the month of Mar., 1935, an interview with a Mr. Nicholass, a chartered accountant, a partner in the firm of Ball Nicholass & Co., who were the auditors and accountants of the company at all material times. In his affidavit filed in this matter on Dec. 4, 1936, Mr. Nicholass says that an interview took place during the first week in Mar., 1935, and that Soutzos informed him that he wished to change the conditions attached to a portion of the loan account due to him by the company so that he agreed not to require repayment of an amount equal to the loss incurred in the company's first trading period until such time as the loss had been covered by subsequent profits. He says that he (Mr. Nicholass) pointed out to Mr. Soutzos that he would need to be careful to secure his position in the event of the company being wound up and to make sure that he would remain in all respects an ordinary creditor in respect of the amount to which he proposed to attach new conditions. After that interview there was a meeting of the board at which the applicant and his co-director, Mr. Mace, were present. In the minute book is this minute:

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A draft account for the period ending Dec. 31, 1934, was produced. A loss of £1,612 6s. 8d. shown in the accounts was considered. In order to strengthen the

A position of the company by covering the amount of the loss, Mr. T. Soutzos offered to divide his loan account with the company, showing a credit balance of £3,400 into two separate loan accounts; one being equal to the amount of the loss in respect of the accounts in question. Mr. Soutzos undertakes not to require repayment except out of available profits, and if required by the company to execute a document giving effect to this resolution. Mr. T. Soutzos however reserves himself the right, and it is an express condition of the loan of the sum of £1,612 6s. 8d. in the event of the company going into liquidation to rank on a par with the other creditors for this amount.

B Now in my judgment the purport of this minute is clear. Mr. Soutzos a creditor of the company for £3,400 was not to release the company from any part of its debt to him, but as regards a part of the company's debt to him, that part being equal to the amount standing to the debit of the profit and loss account on Dec. 31, 1934, that part was not to be immediately repayable by the company. It was only to be repayable whilst the company was a going concern out of available profits, but if the company went into liquidation Mr. Soutzos was to rank as a creditor on the same footing as other unsecured creditors of the company in the winding up of the company. Now there is nothing fraudulent in the making of such an arrangement, and it is not suggested that when that arrangement was made Mr. Soutzos or Mr. Mace had any fraudulent intention in their minds. So far as the bookkeeping necessary to be done in connection with the matter was concerned, that was carried through by the accountant and auditor, Mr. Nicholass, as appears from para. 5 of the affidavit to which I have referred. In that paragraph he says:

E After the said interview I made the proposed adjustment by deducting from the loan account an amount equal to the loss and describing that amount as a "loan fund." In the balance sheet the loan fund was set off against the profit and loss account balance. A fair copy of the accounts was then sent by post to the directors (Mr. Soutzos and Mr. Mace) for signature.

F The liquidator exhibits the balance sheet and profit and loss account for the period which ended on Dec. 31, 1934. The exhibit includes the profit and loss account for the period from Aug. 28, 1933, to Dec. 31, 1934, showing a loss of £1,612 6s. 8d. The balance sheet on the liabilities side shows issued share capital, trade creditors, sundry creditors, T. Soutzos loan account and a bill payable, the aggregate of these four items being £3,835 9s. 5d. bank overdraft £1,799 2s. 4d. Total liabilities, including share capital; £10,635 11s. 9d. On the assets side there are assets consisting of debtors, stock, plant and machinery, furniture and preliminary expenses amounting to exactly the same figure. On the assets side there is a statement with respect to
H general profit and loss account.

Net loss for the year to date	..	..	..	£1,612	6	8
Less T. Soutzos loan fund	..	..	..	£1,612	6	8

the two figures cancelling out one another and nothing being carried

into the assets column in respect of what would normally have been the balancing figure, the debit balance of the profit and loss account.

The balance sheet is signed by the applicant and by his co-director, Mr. Mace, and is certified by the company's auditors as being properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company—an unqualified certificate in the usual form. A

On Mar. 6, 1936, the company went into voluntary liquidation and in that liquidation Mr. Soutzos lodged a proof for this sum of £1,612 6s. 8d. which was rejected on Aug. 14, 1936, by the liquidator, Mr. Sunderland, by a written notice of rejection, in which he says that these are the grounds upon which the proof is rejected : B

(a) It appears from the minute of the board meeting held on May 8, 1935, that in order to strengthen the position of the company by covering the amount of the company's loss for the year ended Dec. 31, 1934, £1,612 6s. 8d., being the amount of such loss, was at your suggestion or with your concurrence credited back to the company and your loan account debited accordingly and that you undertook not to require repayment of this amount except out of available profits. It further appears that you purported at the same time to reserve the right in the event of the company going into liquidation to rank on a par with other creditors for the said sum of £1,612 6s. 8d. C

(b) In the company's balance sheet as at Dec. 31, 1934, which was signed by you, your loan account is shown at the figure of £1,787 13s. 4d. only, which was the amount thereof after deducting the said sum of £1,612 6s. 8d. so credited back to the company as aforesaid. D

(c) The whole of the amount of £1,787 13s. 4d. shown in the said balance sheet as owing to you on loan account has been repaid and your present claim for £1,612 6s. 8d. is in respect of the said sum of £1,612 6s. 8d. so credited back to the company as aforesaid.

(d) In the circumstances aforesaid, you are estopped by your signature of the said balance sheet from contending that the amount due to you on loan account at Dec. 31, 1934, exceeded the sum of £1,787 13s. 4d., the whole of which has been repaid. E

(e) Furthermore, the said transactions were carried out in order to give the company a fictitious credit. Such fictitious credit continued down to the commencement of the winding up. The money was represented by you to be the company's money and the purported reservation by you of a right to claim in respect thereof *pari passu* with other creditors on a winding up, which was not disclosed in the company's balance sheet signed by you, was and is wholly void. F

(f) Under the circumstances aforesaid, you are not now entitled to claim in respect of the said sum of £1,612 6s. 8d., or any part thereof in competition with the company's unsecured creditors, but if and when the whole of the company's other creditors shall have been paid in full, I shall be prepared to reconsider your claim as a deferred claim against the company. G

It is against the rejection of proof for that sum on the grounds set forth in that notice that the applicant Mr. Soutzos appeals to this court to reverse the liquidator's decision. It is clear that in Mar. of 1935 Mr. Soutzos did nothing which in law released the company from the debt which it is conceded the company owed Mr. Soutzos of £1,612 6s. 8d. It is clear that the company never paid that debt or any part of it. It is equally clear that the company never got rid of its debt by accord and satisfaction. It is clear that the company at no time had any debt due from Mr. Soutzos to set off against his debt of £1,612 6s. 8d. The H

debt remains and remains as a debt due to Mr. Soutzos from the company.

- The ground upon which it is contended Mr. Soutzos has no right to prove is that he has made some representation which he is estopped
- A from denying and the basis upon which Mr. Clark, for the liquidator, has sought to maintain that the liquidator's act is justified is one of estoppel. The case is put this way. By the balance sheet and his signature to it, Soutzos has made a representation that the only debt due to him by the company at the date of that balance sheet was £1,787 13s. 4d.
- B Having made that representation he is estopped from denying it, not because the liquidator has proved, or anybody has proved that any person acted to his detriment upon the footing of that representation, but because it having been proved that the representation was made, the onus is upon Mr. Soutzos to prove that nobody did act upon the
- C representation to his detriment—an entirely novel proposition for which Mr. Andrew Clark cited no authority and said he could cite none.

- A balance sheet of a private company is not a public document, and there is no obligation to show it to any creditor. There is no proof that it was shown to any creditor, and I can see no grounds upon which on
- D the facts of this case there is any reason for the application of the doctrine of estoppel. The case might have been very different if it had been proved that any creditor had either refrained from taking proceedings against the company to enforce a debt or given credit to the company after he had seen the balance sheet in question; but the form of the
- E balance sheet is one for which the accountant and not Mr. Soutzos must take the responsibility. However, no creditor has been cited as having so acted, and upon the footing that in my judgment the onus of establishing a case of estoppel rests upon the liquidator, and upon the ground that the onus of proving that there is not a case of estoppel does not rest
- F upon Mr. Soutzos, I conclude that the rejection by the liquidator of Mr. Soutzos' proof was wrong and that the applicant is entitled to have that decision reversed and his proof admitted.

Solicitors: *Carter & Bell* (for the applicant); *Herbert Oppenheimer, Nathan, Vandyk & Mackay* (for the liquidator).

- G [Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]
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ELLIS v. FULHAM BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Greaves-Lord, J.), **February 2, 3, 4, 1937.**]*Negligence—Invitee or licensee—Child—Paddling pool provided by local authority—Plaintiff a child of a ratepayer.*

A
A borough council provided a public paddling pool for children. They placed a quantity of sand at one side of the pool, some of which had silted or been pushed under the water. A boy, the son of a ratepayer of the borough, while paddling, stepped upon a piece of glass hidden in the sand and cut his toe :—

B
HELD : the boy was in the position of an invitee, and the piece of glass hidden in the sand was a hidden danger of which the council knew or ought to have known.

[EDITORIAL NOTE. It was sought, and apparently with some success, to suggest in this case that the fact that the injured plaintiff was the son of a ratepayer made him an invitee of the council in respect of this paddling pond. The case is of particular interest since the duties of local authorities in connection with such pools are fully discussed.

C

AS TO DUTY TO CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836 ; AND FOR CASES, see DIGEST, Vol. 36, pp. 69-71, Nos. 442-462.]

Cases referred to :

- (1) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358 ; Digest Supp. D
- (2) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44 ; 36 Digest 70, 453.
- (3) *Purkis v. Walthamstow Borough Council* (1934), 98 J.P. 244 ; Digest Supp.
- (4) *Hastie v. Edinburgh Magistrates*, [1907] S.C. 1102 ; 36 Digest 70, 450v.
- (5) *Coates v. Rawtenstall Borough Council*, [1937] 1 All E.R. 333 ; Digest Supp.
- (6) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. 71 ; Digest Supp.
- (7) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398 ; 36 Digest 38, 223. E

F
ACTION for damages for personal injuries received by a child, aged 9, the son of a ratepayer of the defendant borough, by reason of his stepping upon a piece of broken glass in a public paddling pool. To the facts as set out in the judgment may be added the fact that on a large notice board near the pool was a notice reading as follows : " Owing to the risk of cut feet persons must not take into the paddling pool any bottles, tins or other sharp materials." The father of the infant plaintiff was joined in the action to claim a small sum by way of special damages.

G
Roland Oliver, K.C., I. H. Jacob and R. Gold, for the plaintiffs : The child was in law an invitee of the council, but is entitled to succeed even if he should be held to be no more than a licensee : *Addie (R.) & Sons (Collieries) v. Dumbreck* (1), *Glasgow Corpn. v. Taylor* (2). *Purkis v. Walthamstow Borough Council* (3) is distinguishable as the boy in that case was not of the age of the children invited, and was therefore merely H
a licensee. In this case the boy's father is a ratepayer of the defendant borough, and the council owe a higher duty to him than to the general public.

N. L. C. Macaskie, K.C., Granville Sharp and Willard Sexton for the

defendant council : The plaintiff was only a licensee [Counsel referred to : *Purkis v. Walthamstow Borough Council* (3), *Addie (R.) & Sons (Collieries) v. Dumbreck* (1), *Hastie v. Edinburgh Magistrates* (4), *Coates v. Rawtenstall Borough Council* (5), *Donovan v. Union Cartage Co., Ltd.* (6), *Latham v. A Johnson (R.) & Nephew, Ltd.* (7).]

GREAVES-LORD, J. : In this case, the plaintiff claims damages because, on Aug. 19, he went with other boys to Bishops Park, provided by the Fulham borough council, and he went to a pool, also provided by the borough council as one of the attractions to the park. They have put loads of sand brought from the seaside at the side of the pool, in order to give it all the appearance of the seaside, and to give all the appearance and the attraction of playing in the sand. The pool is so constructed that it is in no place deep. In the middle, the depth certainly does not exceed 2 ft. It is in every way designed for the purpose of attracting the young, who use the pond for paddling, and I suppose one can take judicial notice of the fact that most children, I should think, even within the knowledge of a borough council, when they paddle, take their shoes and stockings off, and go into the pool with bare feet. It must be obvious to the council that such a pool, unless it is carefully supervised, may very easily become of the nature of a trap. At any rate, this little boy went to the pool, paddled there for some time, and then played on the sand, and then, before going home, went into the pool again, in order to wipe the sand off his feet. He went in at the outside only a few paces, and it is not clear whether, in going those few paces, he went beyond the area in which the sand had, from time to time, got down, either by silting or by being pushed there by other children. But he got into the pond, and found that his foot came into contact with a very sharp, hard substance. Therefore, he at once retreated, came out of the pond, and found that he had cut the bottom of the great toe of the left foot rather seriously. He, of course, would not appreciate at first how serious that cut was ; but he was taken up to a hut, which was some 100 yds. away, which is known as the park-keeper's hut. The park-keeper was not there, and the child's playmates went to find him or his representative. After a period of about 20 minutes, they succeeded in finding one, who came to the hut and attended to the little child's foot.

Then the child was taken to hospital. It was then discovered that he had severed the main ligament of the great toe, and prompt attention was given to that in hospital. The ligament was sutured and, happily, beyond a certain amount of shortening of the ligament, which must happen in such a case, and except for certain adhesions, which are still present, the little boy has had good recovery.

The borough council says that, first of all, it really owes no duty to

this little child, except to avoid anything in the nature of a trap, and that it has amply fulfilled the duty that could possibly be cast upon it, and that the little child is merely a licensee. Certain authorities have been cited. I do not think that there is anything in those authorities which impels me to limit this child to the class of bare licensee. In my view, A taking the description of an invitee which is used by VISCOUNT DUNEDIN in *Addie (R.) & Sons (Collieries) v. Dumbreck* (1), I am quite certain that this little child was an invitee. The council provides this pool, no doubt, as one of the things which it promised to provide to the inhabitants of that district out of the rates ; there is no doubt that that is one of B the promises undertaken to the ratepayers. At any rate, it would be very curious if it is not. And, what is more, the council not only provides the pool, but it is especially careful to indicate that it can be provided only for the purpose of children bathing in the way this child did. In fact, if it ever contemplates, on any other C occasion, a crowd similar to that which is shown in the photographs that were handed up to me, there is only one purpose for which this paddling pool could be used, so far as it may attract children. That being so, the council must know, from the start, what is necessary to make that provision a real provision of something worth while, and not a mere D trap. That a piece of glass was there I have no sort of doubt.

Then it is said that this is not in the nature of a trap ; it is not a hidden danger of which the council knew, or ought to have known. Although it is not necessary for me to go so far, I think, in the circumstances of this case, I ought to, and for that purpose I want to consider E what the council did. The council had certain park-keepers. It gave those park-keepers certain instructions. I have no doubt that those instructions were designed in order that one might bring to the notice of the council any danger, such as this, that arose in the pond ; and, although there was some difficulty in getting quite clearly what those F instructions were, I am quite satisfied that Mr. Hughes [the officer of the council in charge of the parks] did give instructions, which, if they had been carried out, might have materially contributed to preventing this accident. And they are instructions which, if carried out, would, in my opinion, in all probability, have discovered G this piece of glass ; but, because they were not carried out, I think this piece of glass was not discovered. To my mind, it is clear that there was a hidden danger, and a hidden danger of which the council ought to have known, and would have known if its servants had done their duty. They say they have taken reasonable care. Reasonable care, in this H instance, is not, in my view, limited to the mere provision of the pool. The pool has to be used from day to day, in a park in which, from time to time, hundreds, and, it may be, thousands, of people assemble. The duty to take reasonable care, in my view, must extend, beyond the mere

- provision of the pool, to its general management. It may be that the council itself thinks that it has done everything that would prevent anything such as this occurring. In one respect, I think the council itself is failing. It realises that a pond such as this may be cleared
- A out ; it realises that it must be raked out. This piece of sand is quite a small area, near to the side of the pond. It is said that a man, every morning, if the instructions are carried out, goes over the pond, and rakes the bottom of the pond, with a rake which I have been shown ; and it is pointed out that that rake would unfortunately not go into the
- B sand at the side, but only on top of it. If anything happened to get embedded in the sand, that rake would not disclose anything of that kind, but only something lying on the surface. I think that is true. I can quite understand, if the whole of the bottom of this pond were covered with sand of this kind, it would be clear, even to the borough
- C council, that raking with that rake was not sufficient. The council contents itself by saying, " There is such a large area which is not covered with sand at all that that ought to be sufficient." It may be with regard to that area, if that raking is regularly and properly carried out ; but, as I have pointed out already, for the purpose of ascertaining whether
- D there is anything embedded in the sand, that rake is useless.

It seems to me that the borough council ought to have recognised that ; and there is no difficulty at all, to my mind, in its providing the keepers with a rake—the area is so small, and is so near to the bank, that it could be easily done from the bank—with which they could have

E raked over and into the sand, just at the side. It is quite true that in those circumstances, they might raise mud ; but, inasmuch as they would be raking that portion of the lake-bottom which is near to the side, the man using the rake would have his attention attracted at once if anything so hard as a piece of glass came into contact with

F his rake ; and there would have been no difficulty in raking out that hard substance, and clearing it out of the pond. Nothing of that kind was done. I cannot help thinking that, if something of that kind had been done, this piece of glass would have been found, and this accident avoided.

- G The difficulty which is again brought up is this : The council does the best it can ; it has always someone supervising. How can you prevent people being careless enough to bring down pieces of glass of that kind, and to slip them into the water when no one is looking ? I cannot help thinking there is a great deal in that ; and it has been pointed out, over
- H and over again, that to hold that the council should provide such supervision as always to prevent anything of that kind getting into the pond would be really asking the council to do more than it is reasonable to ask. But it does not end there. This accident could have been prevented if there were a proper means of supervision ; and I do not

think there is. The instructions given by Mr. Hughes appear to be good, and, if they were carried out, might, as I have said, have prevented this accident; but anything more unsatisfactory than the evidence given by the subordinates in this case I cannot imagine.

The system which Mr. Hughes says is laid down is this: If the subordinate finds out that a child has been cut, and it is suspected that that cut has been incurred through any sharp substance in the pond, the subordinate should report that matter to the uniformed park-keeper; that then there is entrusted to the uniformed park-keeper the discretion as to whether he shall report it further or not. That would go some way, and it might be that that would have resulted in this piece of glass being found. I am not clear upon that, because I am not too certain of the discretion of the uniformed park-keeper. At any rate, in this case it was not done. A little boy was injured in this same pond, somewhere near the place where the plaintiff was injured, quite a few days before this accident happened. That was reported to the subordinate park-keeper. That subordinate park-keeper chose, for this purpose, to treat the instructions given as though they were a dead letter, and as though he was the person who should decide whether or not it should be reported further.

The conclusion to which I have come is that while the Fulham borough council, through its officer, Mr. Hughes, gave instructions which, if they were carried out, might conceivably have avoided this accident, those instructions were not carried out, and, therefore, in my opinion, as the failure to carry out those instructions was negligence on the part of the borough council's servants, the borough council did not exercise that reasonable care which it should have exercised towards a child whom it had invited to this pond. If it had exercised a reasonable care in management, it certainly ought to have known of the presence of this danger, which was unknown to the child. In those circumstances, in my view, the borough council is liable.

Judgment for infant plaintiff for £50 general damages, judgment for adult plaintiff for £19 10s. 6d. special damages, with costs. Certificate that the case was a proper one for the High Court. Stay of execution upon terms.

Solicitors: *Tobin & Co.* (for the plaintiff); *W. Townend*, Town Clerk, Fulham (for the defendant council).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

DIAMANTIDI v. GROSVENOR SECURITIES, LTD., AND THE GUILDHALL TRUST, LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Farwell, J.)
February 4, 5, 1937.]

A *Companies—Sale of shares—Deposit—Condition of solvency—Ascertainment of solvency.*

Upon a proposed sale of 50,000 shares in a limited company, it was agreed that the sale should be subject to an accountant appointed by the purchasers being "satisfied that the financial position" of the vendor company was "solvent":—

B **HELD:** the agreement meant that the accountant had to be satisfied as to the solvency of the company, and his evidence as to what he understood to be the meaning of "solvent" was irrelevant. It was not for the court to determine the meaning of "solvent."

Appeal from MACNAGHTEN, J. ([1936] 2 All E.R. 196) allowed.

C **[EDITORIAL NOTE.]** Where parties agree upon a domestic tribunal, the general rule is that they must be bound by its decisions, at any rate so long as it does not proceed in total violation of natural justice. The parties having agreed to a sale of shares subject to an accountant being satisfied that the company was solvent, it was not for the court to enquire whether the principles applied by the accountant were proper. In the absence of fraud or caprice, the decision of the accountant was final.

D FOR A DISCUSSION OF THE POINT, see HALSBURY, Hailsham Edn., Vol. 3, pp. 323-327, paras. 595-601, AND FOR CASES, see DIGEST, Vol. 2, pp. 316-322, Nos. 30-71.]

Cases referred to:

- E** (1) *Goodyear v. Weymouth & Melcombe Regis Corpn.* (1865), 35 L.J.C.P. 12; 7 Digest 381, 199.
(2) *M'Lay (M'Queen's Trustee) v. M'Queen* (1899), 36 Sc.L.R. 568.
(3) *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311; 12 Digest 72, 420.
(4) *Clarke v. Watson* (1865), 18 C.B.N.S. 278; 7 Digest 363, 125.
(5) *Ashwell & Nesbit, Ltd. v. Allen & Co.* (1912), 2 Hudson's B.C. 4th Edn. 462; 7 Digest 424, 364.

F APPEAL from a decision of MACNAGHTEN, J., dated May 6, 1936, and reported in [1936] 2 All E.R. 196.

W. N. Stable, K.C., and H. Malone for the appellants.

H. St. John Field, K.C., and Walter Gumbel for the respondent.

G *Stable, K.C.:* The whole deal was conditional upon the accountant being satisfied; that was a condition precedent. The appellants are being asked to pay £3,625 for no consideration. In the absence of fraud or caprice, the accountant's decision is final. His evidence is irrelevant; if he took a wrong standard of solvency, that is immaterial.

H [Counsel referred to *M'Lay (M'Queen's Trustee) v. M'Queen* (2), *Hussey v. Horne-Payne* (3), and *Clarke v. Watson* (4).]

St. John Field, K.C.: The accountant never addressed his mind to the question he had been asked; his report was given on a wholly erroneous basis and he meant the opposite of what he said. It is sub-

mitted that his evidence was admissible; in *Ashwell & Nesbit, Ltd. v. Allen & Co.* (5) the evidence of an architect was accepted which was contrary to a certificate which he had given. There is no English case where any other meaning has been given to "solvent"; it is an ordinary word with a definite meaning; the accountant never considered it. **A**

Stable, K.C., in reply.

SLESSER, L.J.: In this case the plaintiff, Mr. Diamantidi, sued the defendants, Grosvenor Securities, Ltd., for the sum of £3,625, which Mr. Diamantidi maintained was due to him under an agreement which had been entered into between him and Grosvenor Securities, Ltd., in respect of the purchase of certain shares in a company called Real Estate Debenture Corporation, Ltd. The agreement in question, which is dated Nov. 20, 1935, recites that the vendor is entitled to 50,000 shares of £1 each of and in the capital of the Real Estate Debenture Corporation, Ltd.; and in that agreement it is also agreed that the vendor shall sell and the purchasers shall purchase all the said 50,000 shares of the vendor of and in the capital of the Real Estate Debenture Corporation, Ltd., at the price of 12s. 6d. per share, that is to say, £31,250. Then follows a provision with regard to the deposit, which is the sum sued for in this action, of £3,625—and it was provided that that should be paid to the vendor on or before Dec. 10, 1935. Then follow a number of provisions which are not here relevant, and then, finally, we come to cls. 8 and 9. By cl. 8 it was provided:

The vendor shall forthwith upon payment of the said deposit at his own expense apply for the permission of the committee of the London Stock Exchange for dealings in the shares of the Real Estate Debenture Corporation, Ltd., upon the London Stock Exchange, and if for any reason other than the wilful default of the purchasers the said permission shall not be obtained within 1 month from the date of such application the said deposit shall be forthwith returned to the purchasers and this agreement shall become null and void. **E**

Then follows cl. 9, which is really the clause critical to this case: **F**

The vendor shall as soon as the permission for dealings mentioned in para. 8 hereof shall have been obtained authorise the purchasers' accountant to investigate the affairs of the Real Estate Debenture Corporation, Ltd., and this agreement shall be deemed to be subject to such accountant being satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., is solvent and such as has been represented to the purchasers by the vendor as to income and expenditure as set out in the schedules attached hereto and prepared by the accountants of the Real Estate Debenture Corporation, Ltd. **G**

Now, by mutual agreement between the parties, these terms were varied to this extent, that it was agreed that the investigation contemplated in cl. 9 of the agreement should precede and not take place after the payment of the deposit; and it is because, after the investigation which the learned judge has held duly took place, the defendants, Grosvenor Securities, Ltd., refused to pay the £3,625 described as the deposit, that this action was brought. **H**

The defence to the action raised two questions both depending upon this investigation. It was said that on the investigation by a Mr. Gregg, who admittedly was the purchasers' accountant, Mr. Gregg was not satisfied either as to the financial position of Real Estates Debenture Corporation, Ltd., being solvent, or that the income and expenditure set out in the schedule to the agreement were as had been represented to the purchasers. As regards the second matter there is no appeal, but as regards the other point there is an appeal; that is to say that notwithstanding that on investigation, the purchasers' accountants wrote to Messrs. Erskine & Co., their solicitors:

We beg to inform you that we are not satisfied that the company is solvent—the learned judge in his judgment has come to the conclusion that in fact the accountants came to the conclusion that the company was solvent. His actual words are these:

In my view the investigation on Dec. 20 was an investigation under cl. 9 of the contract, that the plaintiff did authorise the first-named defendants' accountant to investigate the affairs of the Real Estate Debenture Corporation, Ltd., that Mr. Gregg was the accountant referred to in that clause and that he was in fact satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., was then solvent.

The learned judge comes to that conclusion on his view of the effect of the evidence of Mr. Gregg, who was called as a witness. Mr. Stable, in opening the case, said this:

I shall call Mr. Gregg, who will say: I am not satisfied either as to the solvency of the company or that these schedules accurately set out the position of the company as to income and expenditure. The point in the case is that I have to satisfy your Lordship that that view is Mr. Gregg's real view of the matter, that it is a view that he honestly entertains, and it is a view that is entertained, not capriciously, but on reasonable grounds.

Now, with every respect to Mr. Stable, I am unable to come to that conclusion. In my view, the words of the contract make it clear beyond question what were the circumstances in which this contract was to be void, because cl. 9 says:

... and this agreement shall be deemed to be subject to such accountant being satisfied that the financial position of the Real Estate Debenture Corporation, Ltd., is solvent.

It says that and nothing more. On Dec. 23 the gentleman found by the learned judge to be the accountant, and found to have made the proper investigation contemplated by cl. 9 of the agreement, stated that he was not satisfied, and thereupon, in my view, this clause operated and the contract came to an end and the plaintiff lost his right to claim the deposit which he otherwise might have claimed. This kind of question has frequently been considered by the courts, more particularly in relation to the satisfaction of architects as expressed in their certificates. It is sufficient for my purpose if I mention the case of *Goodyear v. Weymouth and Melcombe Regis Corpn.* (1). That was a case where the

defendants engaged the plaintiffs to build a market house, and the contract and conditions stipulated that no deviations in the way of extras or omissions should be made without the written authority of the defendants' architect and that they should be priced at the various contract prices. The question raised there was whether there was given A
by the architect a sufficient order in writing that certain pumps, drains, and so on, though separately ordered came within the meaning of the works connected with the contract, and it was held that neither party could raise the question of whether or not there was a sufficient order in writing that a pump, drains, etc., though separately ordered B

came within the meaning of works connected with the contract and that the architect's decision as to their value was final.

In that case the court declined, on the architect stating that those additional works had been erected, to go into the matter at all, and ERLE, C.J., in giving judgment, said, at p. 17 : C

His decision, therefore, is to be final both as to the extras and additions, the prices of which are to be regulated by the schedule ; and it seems to me that the architect having to find what is properly due from time to time he can estimate what is due for extras and additions.

Then follow these words :

We cannot inquire whether he allowed properly or improperly, though of course, D
if his conduct was fraudulent, his determination would be void ; but there is no suggestion of that.

Then WILLES, J., in giving judgment, said this :

Whether this answer is correct (i.e., that these permissions by the architect were conclusive) depends on whether the architect was judge between the parties. It is said, by the defendants, that the architect was not at liberty to set aside the E
provisions of the contract as to a written order being necessary. There is a simple answer to this : if he has done his duty, he has not done so ; if he has, he has decided erroneously ; but that is a matter for his own conscience, and the corporation have to blame themselves for appointing him.

If you employ an architect and he expresses satisfaction when he ought not to express satisfaction, you must be bound by his mistake. That F
passage is quoted by the late Mr. Hudson in his work on BUILDING CONTRACTS (6th Edn., p. 255. The parties here have chosen to make their contract in such a way that if this gentleman says he is not satisfied then the agreement is not to operate. In my view, it was altogether beside the point and irrelevant to inquire into the grounds on which he G
made this statement that he was not satisfied. The materiality of that is that in our view Mr. Stable should have rested his case, as apparently he did, at any rate in part, in his final address to the judge, on the fact that the contract was conclusive in his favour once he produced the statement that there was not satisfaction, and he should have declined H
to call any evidence at all. He is, therefore, in part, responsible for the great increase in expense caused by the examination and cross-examination of Mr. Gregg and the calling of Mr. Cole, and all the other consequences of dealing with a matter which might have been dealt with on

a point of law and determined, as I see the case, in a very few moments. In my opinion, the learned judge was not entitled to go into the question of the basis of Mr. Gregg's satisfaction. I may say I have read through the shorthand notes of the evidence, and after reading them, and if it is relevant to express an opinion on the subject, it seems to me that the judge has substituted his own opinion about the solvency of this company for the opinion of Mr. Gregg. I would also point out that the question upon which this contract—cl. 9—depends is not whether the company is or is not solvent, but whether Mr. Gregg is or is not satisfied as to its solvency.

For these reasons, seeing that so much time and expense have been incurred on a submission made by the appellants which we think cannot properly be maintained as a matter of law, we have come to the conclusion that this appeal ought to be allowed, and judgment entered for the defendants, but that there should be no costs, either in this court or in the court below, on either side.

SCOTT, L.J. : I agree, and I would only make this one observation. It is very important that counsel on each side in a case should bear in mind the question as to whether or not it is necessary to bring evidence before the court. If the evidence brought before the court is irrelevant, it necessarily adds to the cost of the litigation, and one or other of the parties has to pay for it. Sometimes it requires some courage to make the right decision in regard to a matter of that sort, but it is very important to prevent the costs of litigation being unnecessarily increased for reasons of tactics which sometimes are not quite consistent with a courageous judgment as to what the right course is.

FARWELL, J. : I agree. I only want to add one or two words. In my judgment, the whole fallacy underlying the argument for the respondents in this case, and I think underlying the judgment of the learned judge, is that it was for the court to determine what is the meaning of the word "solvent." In my judgment, it never was the business of the court to do that at all. Once the court was satisfied that the accountant appointed by the appellant had considered the matter and had said he was not satisfied, there was an end of it, whether or not the accountant had construed the word "solvent" as meaning the same thing as the judge thought it meant.

Appeal allowed.

Solicitors : *Erskine & Co.* (for the appellants) ; *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

708 [FEB. 27, 1937] ALL EN

WHITE (otherwise) BENNETT v. WHITE.

[PROBATE, DIVORCE, AND ADMIRALTY DIVISION (Bucknill, J.), February
4, 19, 1937.]

Conflict of Laws—Jurisdiction of court—Nullity—Bigamy—Woman petitioner domiciled in England—Ceremony in Australia—Respondent neither resident nor domiciled in England—No appearance by respondent. A

In 1926 the petitioner, who resided in and was domiciled in England, went through a ceremony of marriage in Australia with the respondent, who was neither domiciled in nor resided in England. The petitioner returned to England immediately after the ceremony, but went back to Australia in 1927. She did not, however, join the respondent who had rejoined his lawful wife whom he had married in 1908. The petitioner returned to England in 1929, where she continued to reside up to the time of her petition for nullity. A copy of the petition was served on the respondent in Australia, and he duly acknowledged service. The respondent did not enter an appearance, and he took no further part in the proceedings, but a formal admission in writing by him was put in confirming the fact that at the time he went through the ceremony of marriage with the petitioner he was a married man and that his wife was living. A question of jurisdiction having been raised :— B C

HELD: (i) the petitioner had never acquired the domicile of the respondent, either in law or in fact, and she was still domiciled in England.

(ii) as the respondent had not objected to the jurisdiction of the English courts, and as the petitioner was resident and domiciled in England, the petitioner ought to have her status as a single or as a married woman established in the English courts. The court had jurisdiction in the present case to pronounce a decree of nullity. D

[EDITORIAL NOTE. This case confirms the old doctrine that the jurisdiction of the court in nullity cases is based on residence. In *Inverclyde v. Inverclyde* (1) an exception to this doctrine was made in the case of suits founded upon impotence. It is here held that this exception does not extend to cases of a bigamous marriage celebrated outside England to a person not domiciled in England. E

AS TO JURISDICTION IN NULLITY CASES, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357; and FOR CASES, see DIGEST, Vol. 11, p. 428, Nos. 924-926.] F

Cases referred to:

- (1) *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29; Digest Supp.
- (2) *Salvesen (or von Lorang) v. Austrian Property Administrator*, [1927] A.C. 641; Digest Supp.
- (3) *Roberts v. Brennan*, [1902] P. 143; 11 Digest 428, 926.

PETITION for nullity on the ground that at the time when the petitioner went through a form of ceremony of marriage with the respondent, he was already lawfully married to another woman. The facts of the case giving rise to the question of jurisdiction raised, are fully set out in the judgment. G

Noel Middleton, K.C., and William Latey, for the petitioner. H

Clifford Mortimer for the King's Proctor.

BUCKNILL, J.: The petitioner asks the court for a declaration that the marriage celebrated between her and the respondent, Augustine

George White, may be declared null and void. The basis of the petition is that, at the time when the petitioner went through a form of ceremony of marriage with the respondent, he was already lawfully married to another woman.

- A On the evidence placed before me, I am satisfied that the respondent was lawfully married to one Mary Dolores Fleri, at St. Bartholomew's Church, Taren, Malta, on Aug. 18, 1908. The name of the respondent at that time was Agostino Bianchi. Subsequently the respondent left his wife Mary and Malta, and went to Australia, and, on Sept. 30, 1926, went through a form of marriage with the petitioner, at the residence in Melbourne of the minister of the Unity Church, Melbourne, according to the rites of the Unitarian Church. In the marriage register, the birth-place of the respondent is stated to be Valetta, Malta, and his conjugal position to be a bachelor. I am satisfied, however, that at that time, namely, Sept. 30, 1926, the respondent's lawful wife Mary was alive. The petitioner was born in Paris, in 1905. Brought to England at the age of 5 by her mother, who was a Frenchwoman, she and her mother took up their residence permanently in Liverpool. In 1919 the petitioner's mother married an Englishman in Liverpool, and the petitioner continued to live with her mother and her stepfather in England. In about 1926, the petitioner went to Australia for a trip, and, while there, went through the ceremony of marriage with the respondent which she now seeks to annul. Two days after the ceremony of marriage with the respondent, the petitioner returned to England, and their marriage was never consummated. In 1927 the petitioner returned to Australia to join the respondent, but in fact never did so, for the respondent went back to Malta, and rejoined his lawful wife, and later returned with her to Perth, Western Australia, where they are now living. In 1929 the petitioner returned to England, after the death of her stepfather, and she has resided in England since that date, and, as I find, is domiciled in England. The petition was filed on May 31, 1935, and, at the end of it, there is the usual notice to appear, as follows :

- G To Augustine George White, of 39 Hill Street, Perth, Australia. Take notice that you are required within 60 days after service hereof upon you inclusive of the day of such service to enter an appearance either in person or by your solicitor at the Divorce Registry of the High Court of Justice at Somerset House Strand in the county of London should you think fit so to do and thereafter to make answer to the charges in this petition and that in default of your so doing the court will proceed to hear the said charges proved and pronounce judgment your absence notwithstanding.

- H The notice was signed by the registrar of this court. On July 5, 1935, a sealed copy of the petition was served upon the respondent, and he acknowledged service in the following terms :

I Augustine George White do hereby acknowledge that I am the person of that name mentioned in the within petition and that I have this day been served with a sealed copy of the said petition dated July 5, 1935. (Signed) A. George White.

The respondent has not entered an appearance, or taken any other part in the proceedings. When the petitioner applied to the registry in the ordinary course for a certificate that the proceedings in the cause were correct, and the pleadings in order, the certificate was refused, because the petition stated that :

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the respondent resides at Perth and is domiciled in Australia.

On appeal, I directed that the certificate should issue, so that the material facts could be ascertained at the hearing of the petition. I also directed that the papers be sent to the King's Proctor, so that he, if the Attorney-General should so direct, might be represented at the hearing, to assist the court on the matter of jurisdiction. At the hearing, a formal admission in writing, dated Jan. 5, 1934, and made to the agent of the petitioner by the respondent, was put in, and is as follows :

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I Augustine George White, of 39 Hill Street, Perth, do hereby admit that I am the Augustine George White mentioned in copy of marriage certificate numbered 3646 and that when I went through the form of marriage with Ghislaine Rosy Bennett I was a married man my wife living in Malta. I also state I am now living with my wife Dolores White at 39 Hill Street, Perth. (Signed) A. George White.

C

In England, it is established law that, in cases where a dissolution of marriage is sought, the domicile of the husband is the cardinal and controlling fact, and that the court having jurisdiction in the country of that domicile has sole jurisdiction over the claim for dissolution of the marriage. This principle has also been applied to a case where the petitioner asked that the marriage which had been solemnised between two persons capable of entering into the bond of matrimony should be declared null and void on the ground that the respondent was incapable of consummating it : *Inverclyde (otherwise Tripp) v. Inverclyde* (1). In that case, the marriage took place in England, and, at the commencement of the suit, the petitioner resided in England, and the respondent was domiciled in Scotland, and resided in England and in Scotland. Objection to the jurisdiction was raised by the respondent. BATESON, J., at pp. 41 and 42, stated, as the basis of his decision, that :

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The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment *in rem* binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country . . . if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicile it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution.

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In the case now before me, the petitioner is a woman, resident and domiciled in England, a citizen of this country. In the state of Victoria, in the Commonwealth of Australia, she has gone through a ceremony of marriage with a man already married. At the time when the petition was filed, the man was residing in the state of Western Australia, and is domiciled there, or possibly in Malta, his domicile of origin. Is there

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jurisdiction in this court, on proof of these facts, to decree that this marriage is null and void? The jurisdiction of the court in cases of nullity is statutory, and is now contained in the Judicature Act, 1925, ss. 21, 32. In substance, this jurisdiction coincides with the jurisdiction
A of the ecclesiastical courts, before the Divorce Court was set up in 1857. In procedure and practice, the jurisdiction has to be exercised in the manner provided by the Act of 1925, or by rules of courts, or in the manner in which it was exercised by the ecclesiastical courts. The Matrimonial Rules, 1924, r. 10, provides that any petition may be served
B within or without His Majesty's Dominions. Rule 13 provides that a petitioner cannot proceed to trial unless the respondent has appeared, or it is proved by affidavit that he has been duly served. The essential ingredients to establish jurisdiction in a case of nullity of this kind in this court have not been clearly established by the reported cases. The
C case of *Inverclyde (otherwise Tripp) v. Inverclyde* (1) clearly does not decide the point. BATESON, J., remarked, in that case, at p. 48 :

In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage, and the argument that there is no distinction or difference between the two classes of cases seems to me untenable.

D In my opinion, the case of *Salvesen (or von Lorang) v. Austrian Property Administrator* (2) is not an authority against the exercise of jurisdiction in this case. In that case, the House of Lords decided that a foreign court has jurisdiction to grant, on the ground of illegality in the formation of the marriage tie, a decree of nullity, which is binding on the
E courts in Scotland, provided both the parties to the marriage were domiciled within the jurisdiction of the foreign court at the time when the suit was brought. The case, therefore, decides that jurisdiction in a nullity suit may be based on domicile. LORD PHILLIMORE even said that the foreign court, in the circumstances of *Salvesen's* case (2), had
F exclusive jurisdiction, for he said, at p. 671 :

Finally, my Lords, if the court is a competent court, still more if it is the only competent court—and in my opinion the Wiesbaden court was the only competent court for these parties—its judgment must, for the very reason of the thing, be . . . a “definitive decree declaring a marriage void, which should be universally binding, and which should ascertain and determine the status of the parties once
G for all.”

But, in *Salvesen's* case (2), both the petitioner and the respondent were in fact domiciled in Wiesbaden, whereas in the case before me the petitioner has not, and never has had, the same domicile as the respondent, and is in fact domiciled in England. It seems to me that it would be
H quite unsound to hold that, in the case now before me, the petitioner ever acquired the domicile of the respondent, either in law or in fact. The case most apposite to the present case is *Roberts v. Brennan* (3). In that case, this court granted a decree of nullity for bigamy on the ground that the parties had resided within the jurisdiction since the

marriage ceremony. The suit was in essence the same as the present one, a petition by the wife for a decree of nullity on the ground that the man with whom she went through the ceremony of marriage had a wife living at the time. The ceremony took place in the Isle of Man. At the time of the issue of the petition, the respondent was resident and domiciled in Ireland, and the petitioner was apparently residing within the jurisdiction. It appears that, at some time after the ceremony of marriage, the parties resided together in England. The case was undefended. It was argued, on behalf of the petitioner, that residence within the jurisdiction was sufficient. SIR FRANCIS JEUNE, P., pronounced a decree *nisi*, on the ground that, in his view (p. 144) :

residence—not domicile—is the test of jurisdiction in a nullity case. The jurisdiction of the ecclesiastical courts was based on *the residence of the parties*, and in suits for nullity this court follows the practice of the Ecclesiastical Courts, as prescribed by the Matrimonial Causes Act, 1857, s. 22.

SHELFORD'S LAW OF MARRIAGE AND DIVORCE, 1841, p. 488, states that, in matrimonial causes, the power of the court is *in personam*, and depends upon the locality of the person cited. Though a defendant may usually reside out of the jurisdiction, yet, if he is served with a citation within the jurisdiction of an ecclesiastical court in England, in a suit for nullity of marriage, that court has jurisdiction to try the validity of the marriage, wherever it might have been contracted. *Roberts v. Brennan* (3) decided that, in a case such as the present, it is not the so-called husband's domicile which is an essential ingredient to found jurisdiction, and that residence within the jurisdiction of the parties at any time since the marriage is sufficient. The present case, however, goes one step further, so far as the respondent is concerned. On the other hand, it is in one respect a strange case ; in this case, the petitioner is domiciled and resident here. If, as in this case, the respondent has never resided in England, but the petitioner is domiciled and resident here, is it necessary for her to proceed to whatever part of the world the respondent may happen to reside in, in order to get her status established by a decree of nullity ? This would impose a heavy burden indeed on the petitioner, for the respondent may move about from place to place and have no fixed residence.

Mr. Mortimer, on behalf of the King's Proctor, argued that, in a case of nullity such as this, jurisdiction must be based on the residence or domicile of the respondent within the jurisdiction. He also argued that the decree asked for in this case was not merely declaratory, but that the statutory jurisdiction of the court was invoked, and that certain consequences might flow from such a decree (although not in fact asked for in this case), such as custody of children, order for maintenance, or variation of settlements. Mr. Mortimer further argued that there was a general principle that this court would not exercise jurisdiction in a

case where the respondent has not subjected himself to the jurisdiction by residence, or domicil, or by submission to it. I appreciate the weight of these arguments, and, if the respondent had entered an appearance to the petition under protest against the exercise of jurisdiction, I should

A have had serious doubts whether this court had jurisdiction over the matter. But I do not think I have to decide that question in this case. In my view, the respondent, by his conduct and by his admissions, has so acted as to justify the court in exercising jurisdiction. He has not in terms submitted to the jurisdiction, but he has, I think, made it

B clear that he has no objection to its exercise. In my view, in the special circumstances of this case, the court has jurisdiction to make the decree sought by the petitioner. There cannot be any conflict of laws between different jurisdictions, because it is clear that the ceremony was bigamous, and, therefore, by the law of every Christian community, there never was

C any matrimonial status common to the petitioner and the respondent. Neither can the respondent suffer any injustice by the exercise of the jurisdiction. Moreover, it seems to me just to the petitioner, and also in the public interest, that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman

D judicially established by this court, and should not have to proceed abroad, to wherever the respondent happens to reside, for that purpose, unless the respondent objects to this jurisdiction.

In these circumstances, unless it is clear that this court has no jurisdiction to pronounce a decree, I consider that I ought to interpret the

E Act in such a way as to provide the remedy sought. I therefore pronounce a decree of nullity.

Solicitor: *Robinson & Bradley*, agents for *Gee, French & Entwistle*, Liverpool (for the petitioner); *King's Proctor*.

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

**BOAG v. STANDARD MARINE INSURANCE CO., LTD.
(BODEY, JERRIM & DENNING, LTD. v. PENTIRION
STEAMSHIP CO., LTD.)**

[COURT OF APPEAL (Lord Wright, M.R., Romer and Scott, L.JJ.),
February 10, 11, 12, 1937.]

Insurance—Payment as for total loss—Salvage—Subrogation—Contribution to underwriters of increased value policies.

A cargo carried on a certain steamer was insured under an ordinary policy, and also under an increased value policy. The steamer was stranded and both insurers paid for a total loss and took a letter of subrogation from the owners. Under the ordinary policy a sum of £685 was paid. On a general average adjustment being made £532 4s. 8d. was agreed as the sum arising as salvage to be received by the owners. This sum was claimed by the insurers under the ordinary policy, but the underwriters of the increased value policy claimed to share rateably in the salvage:—

Held: the insurers under the ordinary policy were entitled to the whole sum of £532 4s. 8d.

Decision of BRANSON, J. ([1936] 1 All E.R. 844), affirmed.

[EDITORIAL NOTE.] Subrogation is a matter between the insurer and the insured, and apart from express contract, it does affect the rights of different classes of insurers. It is true that there is a right of contribution between insurers who have separately issued policies covering the same insured in respect of the same adventure and interest, but this right has never been held to exist where the original policy is a valued policy and the further policy covers some further risk. It is to be noted that there was no evidence of any custom to take out increased value policies and there could therefore be no implied condition in the original policy that the insured should do so.

AS TO SUBROGATION, see HALSBURY, Hailsham Edn., Vol. 18, pp. 376-381, paras. 543-547; and FOR THE CASES, see DIGEST, Vol. 29, pp. 290-292, Nos. 2355-2380.]

Cases referred to:

- (1) *Thames & Mersey Marine Insurance Co. v. British & Chilian S.S. Co.*, [1916] 1 K.B. 30; 21 Com. Cas. 150; 29 Digest 292, 2379.
- (2) *North of England Iron Steamship Insurance Assn. v. Armstrong* (1870), L.R. 5 Q.B. 244; 29 Digest 122, 748.
- (3) *Steamship Balmoral Co. v. Marten*, [1902] A.C. 511; 29 Digest 232, 1876.
- (4) *Bruce v. Jones* (1863), 1 H. & C. 769; 29 Digest 122, 747.
- (5) *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q.B. 226; 29 Digest 306, 2534.
- (6) *Phoenix Assurance Co. v. Spooner*, [1905] 2 K.B. 753; 29 Digest 306, 2535.

APPEAL by the increased value underwriters from a judgment delivered by BRANSON, J., on Mar. 31, 1936, and reported in [1936] 1 All E.R. 844. The agreed statement of facts is there set out.

C. T. Miller for the appellants, the increased value underwriters.

W. L. McNair for the respondent company, the Standard Marine Insurance Co., Ltd.

C. T. Miller: When the Standard Marine Insurance Co., Ltd., paid this claim and was subrogated to the rights of the assured, it was put

into the same position as the assured himself. At that time, the assured was insured with Lloyd's underwriters for increased value. He had actually made a claim under the policy at the time he received payment from the Standard Marine Insurance Co., Ltd. It is not possible for the

- A assured to interfere with the rights of subrogation which would enure to Lloyd's underwriters once they had paid. Lloyd's underwriters had, at the time, an inchoate right, which would crystallise when they made the payment, to be subrogated to the assured's rights and remedies. Now, both underwriters having paid on their respective policies and the
- B fund being not yet distributed, they have, by operation of law, each a right to share in the salvage in the proportion in which they have paid. Their position is very different from what it would have been if the assured had received the salvage, paid it over to the Standard Marine Insurance Co., Ltd., and Lloyd's underwriters were now trying to recover
- C their share from the Standard Marine Insurance Co., Ltd. The assured, if he had not insured the increased value, would be bound to hand over the whole of the salvage to the Standard Marine Insurance Co., Ltd., although the salvage is based on a much higher value of the cargo than the value stated in the policy. The Court of Appeal, in *Thames &*
- D *Mersey Marine Insurance Co. v. British & Chilian S.S. Co.* (1), held that the Marine Insurance Act, 1906, embodies the law as laid down in the *North of England* case (2), and that the plaintiffs were entitled to recover all the sums which the shipowners received in respect of the ship up to the amount of the insurance. The underwriter, by virtue of the doctrine of
- E subrogation, as defined by the Marine Insurance Act, 1906, s. 79, is entitled to whatever salvage is recoverable in respect of the subject matter insured, up to the limit of his interest.

The *North of England* case (2) is, however, distinguishable, for here a second underwriter is on the risk. There is a conflict of underwriters.

- F The assured, therefore, by taking payment from one underwriter first, does not in law affect the rights of subrogation enjoyed by the second underwriter. It is incorrect to say that the right of the second underwriter to subrogation does not exist until he pays. He takes the right of the assured to receive the payment in general average, qualified by
- G the condition that the assured is already insured with Lloyd's underwriters, has made a claim upon them, and has a duty not to interfere with their right of subrogation. *Steamship Balmoral Co. v. Marten* (3) is the converse of the *North of England* case (2). There the assured relied upon the *North of England* case (2) for the proposition that, as
- H between the underwriters and the assured, the value in the policy was conclusive. The court, however, held that, for the purpose of ascertaining the proportion of the loss, the underwriters were entitled to look at the true value upon which the contribution in general average and salvage had been assessed. When the Standard Marine Insurance Co., Ltd.,

pays the loss and is substituted for the assured, in the true meaning of the word "subrogation," that company is substituted for a man who has a duty at that time not to interfere with the right to subrogation of Lloyd's underwriters, upon whom he has actually made a claim.

McNair: On Sept. 19, the Standard Marine Insurance Co., Ltd., issued its policy, covering the whole of the consignments, valued at £685. Thereupon, as between the Standard Marine Insurance Co., Ltd., and the owners of the cargo, for all purposes, the whole of that consignment had a value of £685. On the issue of that policy, they had conferred upon them the inchoate right of subrogation, which would crystallise into effect when they had paid. It was a right to be subrogated to 100 per cent. on anything which was recovered by the assured, up to the amount that they had paid. They had a right to recover £685 from the assured, if he received that sum from anyone else. The policy is subject to the Flour All Risk Clauses, and does not expressly, or by necessary implication, confer upon the assured any right to take out increased value policies in derogation of the rights of the Standard Marine Insurance Co., Ltd. The Standard policy has not attached to it the same printed clauses as has the Lloyd's policy. When the cargo owners took out the Standard Marine Insurance Co.'s policy, they made another contract with other underwriters on different terms. Lloyd's policy is subject to the F.P.A. (Free of Particular Average) Clauses, 1927, which would be appropriate for an original F.P.A. insurance. They provide that the original assured, who effects an insurance on F.P.A. terms, may, if he wishes, take out an increased value policy. If that provision had been made in the Flour Risk Clauses, then the effect of taking out the extra policy would automatically have been to increase the valuation in the Standard Marine Insurance Co.'s policy by that amount. No difficulty arises if an increased value policy is used properly, i.e., in addition to an original policy, which contemplates the possibility of an increased value policy. Difficulty is introduced when it is superimposed on a policy which does not contemplate that possibility. The appellants seek to be placed in the position which they would have occupied if the Standard policy had been subject to the F.P.A. Clauses, 1927. They have no right to be placed in that position. There can be no equity requiring the Standard Marine Insurance Co., Ltd., which by its contract is entitled to the whole of the salvage up to the amount which it has paid, to be deprived of that contractual right by some subsequent contract to which it is not a party.

Under the F.P.A. Clauses, 1927, the assured has reserved to himself the right of placing an additional insurance, and the underwriter has subscribed the policy under the express condition that the assured may avail himself of this right. The right of the underwriter to salvage ought not to be diminished by a subsequent contract between the assured and

another underwriter. The *Balmoral* case (3) decided that, when determining the liabilities of the underwriter, the court should not depart from the agreed value.

- A LORD WRIGHT, M.R. : This appeal raises a point on marine insurance law, which, so far as I know, is not covered by any authority. The question is, where you have an insurance by the goods owner on a consignment or a cargo valued at a certain amount, and insured to the full extent of that value, and a later additional or supplementary insurance
- B on the same goods for a further amount, on what is called increased value, valued at that increased value figure, and the goods are lost by being jettisoned, so that the goods owner is entitled to be recouped in general average, which of the two sets of underwriters have claims to be subrogated to the amount of the general average contribution so
- C recovered by the goods owner ; that is to say, is the underwriter on the primary policy entitled to be subrogated to the whole, or must he share with the underwriters on the later or supplementary policy on increased value ? In stating that question, I have not added one element, which might be of considerable importance in a certain event. I have not
- D stated that, for the purposes of this inquiry, the general average contribution is less than the amount covered by the primary policy. If it had been in excess of that amount, then a further question would have arisen as to the surplus, but that complication does not arise here.

- The action was brought by the plaintiffs against the shipowners
- E claiming a proportion of the general average contribution as adjusted. The claim was for 215/900ths of that sum. It is clear that the plaintiffs in bringing this action, were so doing on behalf of the increased value underwriters, and that the real question involved a matter of competition between the two sets of underwriters. That being so, it was very conveniently ordered, no doubt by an agreement, that the issue should be
- F tried out as between these two parties, and the shipowners, who had no interest in the matter at all, dropped out. Therefore, the two litigating parties here are the first underwriters, the Standard Marine Insurance Co., Ltd., on the one hand, and the increased value underwriters, who
- G are Lloyd's underwriters, on the other hand. The consignment in question was a consignment of wheat offals shipped from an Italian port. The shippers had sold a consignment to the nominal plaintiff company, and had transferred to it the usual shipping documents, which included the Standard Marine policy for £685, the invoice amount. The policy was
- H a value policy, and the total valuation was £685. After the plaintiff company had taken over the documents, it appeared to it that the value of the consignment had increased above the invoice amount, and thereupon it effected a further policy for £215 on increased value so valued. I say that it effected a further policy, but in fact what it did was to make a

declaration against a floating increased value policy for a total amount of £5,000, in which it was interested as assured. On the voyage, the vessel, which had loaded at Naples with the consignment in question, got into trouble, and went aground off Cape Huertas on Sept. 27, 1934. She was finally refloated, but the consignment in question was jettisoned, and became a total loss, and the general average contribution to the cargo owner, in respect of that loss by jettison, was adjusted at £532 4s. 8d. That is the sum about which this battle rages. The increased value underwriters claim that they are entitled to £127 2s. 11d. as a sum to which they are subrogated under their policies, leaving the balance to the Standard Marine Co. That sum of £127 2s. 11d. is arrived at by taking the net sum arrived value of the consignment of £900, which is the sum of £685 and £215, the two amounts insured. The Standard Marine Insurance Co., Ltd., claims that it is entitled to the whole amount, on the ground that it is the property of the company by subrogation. The two policies differ in their terms. I ought to say the three policies, because the amount covered by the Standard Marine Insurance Co., Ltd., though coming, in all, to £685, is covered by two policies, which, however, are in identical terms, and they are both dated Sept. 19, 1934. They are :

Subject to four "all risks" clauses as attached—

and, as I have already said, they are both valued policies, each on a separate portion of the consignment, but they add up, taken together, to an insurance for £685 on cargo which altogether is valued at £685. The Lloyd's policy, the floating policy, is in a different form. It is an F.P.A. policy, subject to the F.P.A. clauses, issued by the London Corn Trade Association, and containing clauses for use in increased value policies. It purports to be a floating policy on :

increased value on grain and/or meal and/or cake to be declared and valued hereafter at the difference between the purchase price and highest market value during voyage.

In this case, that valuation, for the purposes of this policy on increased value, is fixed at £215, which was the amount declared and duly written off the floating policy. There are only two clauses in that policy to which I need call special notice. One is the clause at the end of the general F.P.A. clauses not specifically appropriated to the increased value policy, which is in these terms :

In the event of any additional insurance being placed by the assured for the time being on the cargo herein insured, the value of the cargo shall, in the event of loss or claim, be deemed to be increased to the total amount insured at the time of loss or accident.

That means, if you have what I may call an ordinary policy, and you effect an additional insurance on the same cargo or parcel, then the original policy value is to be increased to the total of the two values, if

the case is limited to the two values ; that is to say, applying that to the present case, if the first policy had been a policy with these clauses for £685 on the consignment valued at £685, then, when the £215 of increased value was covered, the value in the former policy would be increased to

A £900. That is a businesslike arrangement, providing for this particular state of things, and having the effect of eliminating the raising of such questions as arose in this case. Then there are two further clauses added, to apply to increased value policies, and the second of those clauses is in the same terms as is the additional insurance clause which I have just

B read, and will have the effect of applying that clause to a case where, after one increased value policy had been effected, another is taken out. These are the two policies. There are only two other facts to which I need refer. One is that a subrogation letter in the usual form dated Nov. 3, 1934, was signed by the goods owners in favour of the Standard

C Marine Insurance Co., Ltd. Later, on Dec. 14, 1934, the goods owners signed a subrogation letter in favour of the Lloyd's underwriters. The former of these letters related to the sum of £685, and recited that that sum had been paid as for a total loss under the Standard Marine policy. The second of these letters referred to the policy for £215 on the increased

D value, and recited that that amount had been paid. In those circumstances, it seems to me, agreeing with the learned judge, that the claim of the Lloyd's underwriters is ill-founded. I come to that conclusion on the clear words of the Marine Insurance Act, 1906, s. 79 :

E Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss.

Those words merely give effect to a well recognised law, subject to one

F point, which is, however, not here material, applying to subrogation. The result is, that it is an integral condition of this policy that the Standard Marine Insurance Co., Ltd., has a contingent right of subrogation, which attaches, and which vests in it at the moment when the policy is effected. It is contingent in the sense that the state of affairs

G postulated may never arise, but the contingent right is there, and here the contingency has arisen, and the right vested as a contingency has become an effective right. In the facts of this case I can see no answer to that conclusion. We are not here troubled with the question, which has been greatly debated, whether, under sect. 79, and the earlier cases

H on which it was based, the right of subrogation in such a case—if it is a question of subrogation, and not one of abandonment—would extend, and give the underwriter a right or remedy exceeding in value the amount for which he is liable under his policy. So far as that is concerned, the law is now covered in this court by the decision of the Court of Appeal

in the case of *Thames & Mersey Marine Insurance Co. v. British & Chilian Steamship Co.* (1), at p. 152. In that case, SWINFEN EADY, L.J., sums up the matter in this way. He quotes the section which I have read, and then he says :

What the underwriters are really saying here is that according to the true construction of the statute they are entitled to be subrogated to all the rights and remedies of the assured in and in respect of the subject matter of the ship, and not to part of it only. In my opinion, the Act embodies the law as laid down in *North of England Iron Steamship Insurance Association v. Armstrong* (2), and the judgment below was right on this point and the plaintiffs [the underwriters] are entitled to recover from the shipowners all the sums which the shipowners received in respect of the ship [then come the material words] up to the £45,000, the amount of the insurance.

Applying that here, the plaintiffs, the underwriters, are entitled to recover all the sums which the shipowners received in respect of cargo up to the £685, which is the amount of the insurance. Now, as I say, that limitation may be accepted here without question, because the amount of the general average contribution recovered is £532, while the amount of the insurance is £685. Now, the position would have been different if this had been a case of double insurance under sect. 32 of the Act, but Mr. Miller has very fairly pointed out that it cannot be so regarded, and I need not trouble any further about that. In the case of double insurance, obviously, as the two sets of underwriters have to share the burden, they would be entitled to the proportionate benefit of any sums which went in reduction of the burden, and they would share both the amount of the indemnity which had to be paid, and against that they would be entitled to share the salvage in regard to which they were entitled to be subrogated in reduction of that indemnity. There is no such question here. The case here is that of a subsequent and subsidiary insurance, an increased value insurance, which is effected by way of supplement for the goods owner's convenience, in order to make up what he regards as the full value over and above the first insurance. The first insurance is on the whole of the subject matter, and is on the subject matter for its full value for purposes of that policy, and as between the goods owners and the underwriters of that policy. As that is so, they are entitled to the full rights of the subrogation. There is no circumstance here which would entitle any reopening of the valuation, or any supersession of the valuation between those parties, such as might arise in the case of a constructive total loss, or as might come into question in such a case as the *Balmoral* case (3), which did not deal with rights of subrogation, but with an entirely different question, namely, the liability of an underwriter to shipowners who were claiming for a partial loss in respect of general average and salvage charges. It was held, in the *Balmoral* case (3), that, in such a case, in those circumstances, the valuation had to be brought into consideration, because, if the general average and the salvage charges were adjusted on a higher valuation than that which

appeared in the policy, the underwriters were liable only in the proportion which the insured value bore to the value for the purposes of the adjustment. That is an entirely different question, and is dealt with, in fact, under a different section of the Act, namely, sect. 73. I cannot find any guidance in that case for present purposes. Mr. Miller has read a passage from the judgment of LORD BRAMPTON in the *Balmoral* case (3), at p. 519, but I need not discuss that passage in detail, because it seems to me not to afford any help in this case. It was dealing with an entirely different question, namely, the right of the shipowners to claim against the underwriters in such a case as I have stated. It was before the Act, and there are some aspects of what LORD BRAMPTON said which I find it difficult to follow. However that may be, it affords no assistance, in my judgment, in the present case.

Mr. Miller's main argument appears to have been based upon the letters of subrogation. He claims that, because the goods owners have assigned to the Lloyd's underwriters a share of the salvage, that share has been properly vested in the Lloyd's underwriters, and, on that ground, they are entitled to succeed in their claim here, but it seems to me that, if that were done, the effect of it would be that the rights of the Standard Marine Insurance Co., Ltd., to subrogation, in the sense which I have explained, would be prejudiced, if it is entitled, as I think it is, to the whole of the rights and remedies of the assured. Any attempt by the assured to dispose of the value of those rights and remedies in any other direction, whether to increased value underwriters or to anyone else, would, to my mind, either be futile, or, if, in fact, the rights of the Standard Marine Insurance Co., Ltd., were affected, would entitle the Standard Marine Insurance Co., Ltd., to bring an action against the goods owners to recover from them to the extent that its valuable rights of subrogation had been prejudiced. I need not refer to authorities for that, because that has long been established. What I think is at the basis of the contention of the Lloyd's underwriters is that there is an implied term in the original policy, the policy for £685, entitling the goods owners, if the value of ~~the~~ cargo does rise, to take out an increased value policy, and to take out ~~such~~^a policy as would rank *in pari passu* with the first and main policy, but I cannot see any foundation for that argument at all. It is perfectly clear that, if the Standard Marine policy had contained a clause analogous to that which I have read from the F.P.A. clauses in the Lloyd's policy, there would have been an express vesting of such a right in the goods owner, and the matter could have been worked out, in accordance with that intention, on business-like lines, by increasing the total valuation under both policies to the valuation of the two policies taken together. But nothing of the sort has been done here, and, in the absence of an express clause, I cannot imply any such intention to the original¹ policy. In this connection, it is

useful to refer to a short passage of PHILLIPS ON INSURANCE, 3rd Edn., Vol. 2, p. 402, where the learned author says :

The rights of an underwriter cannot be affected by any contract made by the assured with another underwriter or any other person, except so far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition that the assured may avail himself of such right. A

Then the learned author adds this :

Upon this principle, the amount of salvage to which one underwriter may be entitled upon an abandonment [I think that includes subrogation] ought not to be diminished in consequence of any particular agreement between the assured and other underwriters on the same subject. B

I think that rule applies here. In all those circumstances, it seems to me that there is no foundation at all for any argument that the position under the Standard Marine policies has been in any way affected by the Lloyd's policy, which is, for these purposes, simply *res inter alios acta*, and that policy does not affect the position between the Standard Marine Insurance Co., Ltd., and the goods owner for any purposes in the facts of this case, and it does not prejudice the rights of subrogation of the Standard Marine Insurance Co., Ltd., nor does any dealing subsequently, such as the letters of subrogation, have any such effect. I think the judgment of BRANSON, J., was right, and should be affirmed, and the appeal dismissed with costs. C D

ROMER, L.J. : In my opinion, on Sept. 28, 1934, when the increased value policy was effected, the Standard Marine Insurance Co., Ltd., had, by virtue of the decision of this court in the *Thames & Mersey Marine Insurance Co.* case (1), to which LORD WRIGHT, M.R., has already referred, and by virtue of the Marine Insurance Act, 1906, s. 79, become contingently entitled to receive the sum of £532 2s. 8d., which is the subject matter of these proceedings. That right is not one of which the assured could deprive the Standard Marine Insurance Co., Ltd. I agree that this appeal fails, and must be dismissed with costs. E F

SCOTT, L.J. : I agree. There is no section of the Marine Insurance Act, 1906, and no judicial decision, which directly covers the question raised in this appeal, but, in spite of an attractive and thoughtful argument from Mr. Cyril Miller, I think the law is beyond doubt, and is against him. The decision of the Court of Queen's Bench in the case of *North of England Iron Steamship Insurance Assn. v. Armstrong* (2) was definitely approved by the Court of Appeal in the case of *Thames & Mersey Marine Insurance Co. v. British & Chilian S.S. Co.* (1), and is therefore binding on us to-day. In the course of his judgment in the latter case, SWINFEN EADY, L.J., said in terms, in the passage which LORD WRIGHT, M.R., has quoted, that the court was affirming, in effect, G H

the decision in the *North of England Iron Steamship Insurance Asscn.* case (2). I think it is important to correct the report of the *Thames & Mersey* case (1) as it is in the Law Reports, because, at p. 32, it is stated :

A No argument was addressed to the court upon the point decided by SCRUTTON, J., and reported [in the court below].

Then it goes on :

The arguments in the Court of Appeal were limited to the question of fact how much was recovered in the collision proceedings by the assured in respect of the subject matter insured, i.e., the ship.

- B That is incorrect, as appears from the report in 21 Com. Cas., and one or two other reports, particularly as shown by the passage LORD WRIGHT, M.R., has read. The decision in the *North of England* case (2) was that, as between the assured and their insurers, on a valued policy on hull valued at £6,000, the whole of a sum of about £5,000, recovered from the
- C owners of a vessel which had been held in fault for the loss of the insured vessel, belonged to the insurers, as salvage, to which they were entitled by virtue of their right of subrogation. It was argued for the assured that, because the real value of the vessel had been £9,000, and because the damages recovered in the collision action had been assessed in the
- D light of that value, they were entitled to share to the extent of one-third, or 3000/9000ths, in the amount recovered, but the court held that the valuation was binding as between the assured and the insurers, and that, up to that amount, any damages recovered belonged to the insurers as salvage, because the assured were estopped from saying that the value
- E of the vessel, in respect of which they had been paid damages, was anything different from the value agreed in the policy. In the present case, if the shipowners had paid the net amount of the general average statement of £532 4s. 8d. direct to the assured, and the Standard Marine Insurance Co., Ltd., had thereupon sued the assured for that sum as
- F money had and received, the assured would have had no answer. The two cases above cited, as well as others, are, in my view, clear authority for that conclusion, and the reason would have been the essential nature of a valued policy binding both parties to the agreed valuation. By virtue of that contractual term the right of the Standard Marine
- G Insurance Co., Ltd., to claim that amount as salvage, it being less than the total valuation of £685 in the two policies, would have attached automatically and instantaneously on its receipt by the assured. In such a case, it would be no defence to the assured to plead that they had in effect entered into a Lloyd's increased value policy for £215 on the
- H same consignment valued at £900, because the Standard Marine Insurance Co., Ltd., would have replied that that was *res inter alios acta* so far as it was concerned, and could not prejudice its contractual right, which had already accrued in respect of the whole sum in the hands of the assured, so as to identify it as money had and received for that

company's use, or possibly even to constitute it a fund held in trust for it. *Bruce v. Jones* (4) supports that view. Had the assured in any way prejudiced its rights of recovery so as to deprive the Standard Marine Insurance Co., Ltd., of the benefits of subrogation, the assured would have incurred a personal liability to that company to the extent of the prejudice so caused. *West of England Fire Insurance Company v. Isaacs* (5) and *Phoenix Assurance Company v. Spooner* (6) are authorities for that proposition. Now, if my view of the hypothetical position, assuming the fund to have got to the hands of the assured, which I assumed just now, is legally correct, as I think it is, it really establishes the view and conclusion of law which Mr. McNair has submitted to us namely, that, if the assured wanted to keep open a liberty to take out an additional policy on the same subject matter on a higher valuation, he ought to have obtained the consent of the Standard Marine Insurance Co., Ltd., to include in its policy the institute clause which was subsequently, in fact, attached to the Lloyd's policy on increased values, in the words which LORD WRIGHT, M.R., has already read out, and which I need not repeat. Had the assured reserved that right, his subsequent Lloyd's policy would have been within the contemplation of that clause, and therefore not *res inter alios acta*. I said just now: "Had he wanted to take out an additional policy on a higher valuation," because, of course, if it had been on the same valuation, it would have been irrelevant to any question here, because it would have simply produced a case of double insurance. Without such a clause in the Standard Marine policy, I think the assured is estopped by the valuation clause from alleging that the subject matter of the insurance ever had any increased value; that is to say, a value over and above the value agreed to in the Standard Marine policy, and, if the assured is so estopped, I think that the subsequent insurer, standing, as he must, in his assured's shoes, is equally estopped. At first I was attracted by Mr. Miller's argument that there must be an equity between the two insurers to share in the salvage, resting on the same sort of principle as that of contribution between co-sureties and an equity, independent of the terms of the statute, though analogous to the principle applicable in certain cases of double insurance. But I think Mr. McNair gave the true answer to that, namely, that Lloyd's underwriters could derive title only, so to speak, through their assured, and, in regard to the extent of the rights of subrogation of the Standard Marine Insurance Co., Ltd., its assured had parted with his interest in any salvage he might recover, from which follows, in my view, the conclusion expressed by ROMER, L.J., in his short judgment just now. The letters of subrogation are irrelevant to any question, if that be the right view of the law. Whether they constitute contracts for good consideration, upon which an action could be brought, does not arise, and I express no opinion as to whether the

Lloyd's underwriters had any rights against their assured in the circumstances. I agree that the appeal should be dismissed with costs, and that we should affirm the judgment of the court below.

Appeal dismissed with costs.

A Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellant); *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the respondent company).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

B

KROCH v. ROSSELL ET COMPAGNIE SOCIETE DES
PERSONNES A RESPONSABILITE LIMITEE.

KROCH v. SOCIETE EN COMMANDITE PAR ACTIONS
LE PETIT PARISIEN.

C [COURT OF APPEAL (Slessor and Scott, L.JJ.), February 1, 2, 1937.]

Practice—Service out of the jurisdiction—Tort committed within the jurisdiction—Libel in foreign newspaper—Small circulation in England—Foreign plaintiff—No reputation in England—Substance of complaint—R.S.C., Ord. 11, r. 1 (ee).

D

The plaintiff brought an action for libel in England against the respective publishers of a Belgian newspaper and a French newspaper. The evidence showed that the newspapers were published in Belgium and in France, respectively, and that they circulated almost entirely within those countries, only a very small number of each being brought to England and distributed there. The plaintiff, who was a foreigner, stated that he was a gentleman of no occupation, and there was no evidence that he had any reputation in or associations with England. The plaintiff applied for an order under R.S.C., Ord. 11, r. 1 (ee), for service out of the jurisdiction upon the defendants in each case:—

E

HELD: assuming that there was a tort committed within the jurisdiction and technically within the terms of R.S.C., Ord. 11, r. 1 (ee), there was no question of substance in England, and as the plaintiff's substantial complaint, if any, was one which ought to be investigated in the one case in Belgium and in the other case in France, an order for service out of the jurisdiction ought not to be made.

F

[EDITORIAL NOTE. There appears to be no reported case construing the sub-rule (ee), which was added in 1920, though there is a considerable body of authority upon the somewhat similar sub-rule (f). In order to secure service out of the jurisdiction there must be some substance in the wrong complained of as being committed in England.

G

AS TO SERVICE OUT OF THE JURISDICTION, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 117-121, paras. 208, 209; and FOR CASES, see DIGEST, Practice, pp. 351, 352, Nos. 667, 668. See also YEARLY SUPREME COURT PRACTICE, 1937, p. 91.]

H

Cases referred to:

- (1) *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1903), 88 L.T. 490, on appeal (1904), 90 L.T. 733; 36 Digest 776, 2563.
- (2) *Johnson v. Taylor Brothers & Co., Ltd.*, [1920] A.C. 144; 39 Digest 660, 2515.
- (3) *Dunlop Rubber Co., Ltd. v. Dunlop*, [1921] 1 A.C. 367; Digest, Practice, 536, 1992.

- (4) *The Hagen*, [1908] P. 189; Digest, Practice, 340, 579.
- (5) *Société Générale de Paris v. Dreyfus Bros.* (1885), 29 Ch. D. 239; (1887), 37 Ch. D. 215; Digest, Practice, 339, 574.
- (6) *Rosler v. Hilbery*, [1925] 1 Ch. 250; Digest, Practice, 340, 582.
- (7) *Brunswick (Duke) v. Harmer* (1849), 14 Q.B. 185; 32 Digest 342, 248.

A

APPEALS from an order of LEWIS, J., dated Dec. 18, 1936, and from an order of GREAVES-LORD, J., dated Jan. 12, 1937. The facts are fully set out in the judgments.

Valentine Holmes for the first appellants.

Harold Murphy, K.C., and *R. Pezzani* for the second appellants.

B

G. O. Slade for the respondent.

Holmes: The tort was committed in Belgium if at all: there was no publication in England by the defendants, and the causation of the publication was in Belgium. The burden on a plaintiff who wishes to bring a case into the jurisdiction is very heavy. There was no ground for the judge to exercise his discretion in this case as he did. [Counsel referred to *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1); *The Hagen* (4); *Johnson v. Taylor Brothers & Co., Ltd.* (2); and *Rosler v. Hilbery* (6).]

C

Murphy, K.C.: We desire to justify; all the documents are in France, and some of them are not allowed to go out of that country.

D

Slade: Libel and slander must be regarded differently from other torts, because the place where they are published is of the greatest importance. There is jurisdiction if there is publication in this country. A publication of a libel in a newspaper takes place every time a copy is sold: *Brunswick (Duke) v. Harmer* (7). If copies were sent to Hachette then each copy is a publication. The respondent relies upon the resale by Hachette to persons in this country—that is clear publication in this country. Every judge's order is discretionary, and the same principles apply, whether an action be founded in contract or in tort; but torts affecting reputation are on a different basis, and should be dealt with in the country where the reputation is. A man may not mind his reputation being assailed outside England, but in England it may be vital to him: *Dunlop Rubber Co., Ltd. v. Dunlop* (3).

E

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G

SLESSER, L.J.: There are two applications before the court, arising out of different matters, but raising in substance the same question. The first is an action brought by Mr. Kroch, who describes himself as a gentleman of no occupation, against a newspaper, the publishers of which are Rosell et Compagnie Société des Personnes à Responsabilité Limitée, who are publishers who own a paper called *Le Soir*, which is a Belgian paper. It is alleged, in the first case, that, on Aug. 31, 1936, there was published in that paper a libel against Mr. Kroch, and he accordingly issued a writ on Nov. 4, 1936, against the defendant company, for libel

H

in the daily journal called *Le Soir*. In the other case, which is a case against a company which is the owner and publisher of a French newspaper called *Le Petit Parisien*, similarly, there is a complaint of a libel in different terms, and, so far as I can understand the translation, not quite so severe in its terms, but which is said to constitute defamatory matter. In that case, the action is brought against that company, which is separately represented before us. In both these cases, the defendants are limited companies abroad, and it was necessary, in both cases, to obtain orders for service out of the jurisdiction. The usual *ex parte* applications having been made upon affidavits, which I will consider in a moment, leave so to serve was granted in both cases, and on that application was made to the judge to set aside the order, and, upon the judge declining so to set aside the order in both cases, an appeal has been brought to this court.

Now, the principles upon which the order for service out of the jurisdiction will be made are contained in R.S.C., Ord. 11, r. 1, and it is said that this case falls within Ord. 11, r. 1 (*ee*), that the action is founded on a tort committed within the jurisdiction. The evidence goes to show that in both cases the distributing company, Hachette Librairie, receives copies which it buys itself, and they are sold, through its agency, to a limited number of persons in England. I think, for the purpose of this case, at any rate, it will be right to assume that there was committed a tort by the two defendants, respectively, within the jurisdiction, in causing to be published these alleged defamatory matters, assuming, of course, that they are defamatory. But the fact that the case might be tried in this country, and might be within the jurisdiction, is not necessarily a sufficient reason for allowing leave to be given to serve out of the jurisdiction. The various matters which have to be considered have been constantly before the courts, the question of the convenience of the forum, the question of under which laws, such questions as the place where the evidence may more regularly be obtained, where the case may more conveniently be heard, and a number of other considerations, which it is perhaps unwise to attempt to define in any particular manner. Now the rule, as its language invokes, gives primarily a discretion to the judge. It says that service out of the jurisdiction may be allowed; but, as was pointed out by COZENS-HARDY, L.J., in *Badische Anilin und Soda Fabrik v. Chemische Fabrik vormals Sandoz* (1), at p. 496:

There are many cases in the books in which, after leave has been given to issue a writ for service out of the jurisdiction and a motion to discharge it has been refused by a judge of first instance, the Court of Appeal has said that they thought the order ought to be discharged. And they have, under certain circumstances, beyond all doubt gone into the facts of the case with a view to considering whether the plaintiff had or had not a probable cause of action such as ought to be tried against a defendant out of the jurisdiction. It seems to me that the court is bound to some extent to look to the affidavits, and to see, if it can, what is the real point in issue between the parties.

That is to say that, primarily, the matter is, of course, one of discretion for the judge. If this court, on consideration of all the matters, should come to the conclusion that, in exercising that discretion, the judge has not had regard to all the matters which it appears to this court ought to be considered, as may be judged, among other things, upon the result of the apparent exercise of his discretion, this court will not, in appropriate cases, hesitate to deal with the matter itself, as COZENS-HARDY, L.J., says, on the affidavits and material before it. A

Now, in this particular case, it does appear *prima facie* that this is not a question of substance in this country. As was pointed out in *Johnson v. Taylor Brothers & Co., Ltd.* (2), at p. 153, by VISCOUNT HALDANE, the court may : B

refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the terms of the rule, is in substance not so. C

In my view, this case, rightly considered, falls within that observation. It is a case where I assume in favour of Mr. Slade that, technically, there is a breach within the jurisdiction and in the letter within the terms of R.S.C., Ord. 11 (r. 1) (*ee*), but in substance it is not so. The evidence goes to show that the newspapers in question are respectively a French and a Belgian newspaper, published respectively in France and Belgium, and circulating almost entirely within those countries. Affidavits have been sworn in these cases which show the number of copies which is likely to come to this country in each case. In the case of the Belgian paper, *Le Soir*, it is true that Mr. Kroch, the plaintiff, says in his affidavit that the journal is sold and distributed in London, and that he verily believes the defendants have circulated and distributed throughout the United Kingdom a large number of the copies of the issue of that journal dated Aug. 31, 1936, but he gives no grounds whatever for his information and belief, and, as this court has often said, an affidavit sworn in that form is almost valueless. We have, however, specific evidence of a Mr. Dew, a member of the firm of Lewis & Lewis, the solicitors. After dealing with the question of whether certain retail traders did or did not sell *Le Soir*, he says that the vendors of the actual copies which the plaintiff bought : D E F

obtain their supplies of *Le Soir* from Messrs. Hachette. This accords with the information which I have received from the defendants, namely, that they supply the French firm of Hachette, who are the distributors of *Le Soir* for England, with about 50 copies of *Le Soir* every day, of which an average of 30 per cent. are returned as unsold papers. G

So it appears that, on that evidence, the number of copies of *Le Soir* which ever reaches this country is really insignificant, well under 50. In the case of the other paper, which it is convenient to deal with at the same time, it is even more marked. It appears that that has a circulation in Paris of about a million and a half copies a day, and he also says that H

they send them to England through Hachette, who do the selling and distributing of the newspaper, after buying copies in Paris. On the date in question it is stated that 401 copies, out of a million and a half, were brought into this country by Hachette, chiefly for the convenience of French readers in England. It appears to me, therefore, that in no sense can it be said that there is any substantial importation of these papers in England, or that the libel which is said to affect the plaintiff in England is anything but a very minor incident of the substantial publication in France. I quite agree with Mr. Slade that, if there were evidence in a particular case that a person had a reputation in this country to be defamed, or was known here, or traded here, or had professional or social connections, it might be that the circulation of a very few copies might do him very serious or irreparable harm. It is certainly an element to be taken into consideration. The mere fact by itself of a very small circulation, even in a foreign tongue, would not necessarily preclude him from saying that among the people of that nation who read that paper in this country, he would suffer grievously in reputation; but the difficulty with which Mr. Slade finds himself confronted is that there is absolutely no evidence from his own client's affidavits, that he has any reputation in, or, indeed, any associations with, this country at all. He states, to begin with, that he is a gentleman of no occupation. A gentleman of no occupation, I think, if I remember my BLACKSTONE rightly, means a person of certain means who can support the port and countenance of a gentleman, but does not necessarily mean he has any associates in this country. After that, the affidavit is completely silent as to his interests or connections in this country. But the matter does not end there, because, in para. 7 of the affidavit which is sworn by Mr. Ridge in the *Le Petit Parisien* case, he says this :

From the inquiries I have been able to make in this country in the short time since my principals were instructed, the writ having only been served in France on Dec. 23, 1936, I verily believe that the plaintiff has no permanent address in this country. The address given by him in the writ, namely, 45, Manchester Street, is a place where he occupies one furnished room. He is an alien, having a domicile in Germany, and he is in this country only temporarily for the apparent purpose of launching this and similar litigation. From my inquiries, I believe that he only arrived in this country towards the end of Aug., 1936, and I have not yet been able to ascertain how long he has permission to stay here.

That is a direct negative of anything which might be said in regard to his reputation in this country. It seems to me altogether different and distinguishable from a position such as that, for example, which arose in *Dunlop Rubber Co., Ltd. v. Dunlop* (3), where LORD BIRKENHEAD, L.C., at p. 374, points out that Mr. Dunlop, who was resident in Ireland, had given evidence that he was :

indifferent to ridiculous reproductions of his appearance in any country but Ireland; it is to their production in Ireland that his complaint in these proceedings is confined.

In this case, there is no evidence whatever that this gentleman, Mr. Kroch, knows anybody in this country at all, or has any interest in it.

I have dealt with this case at some length, in compliment, first of all, to Mr. Slade, who said everything that possibly could be said for his client, and, secondly, because I think it is right that this foreign gentleman should know that his rights have been fully considered by the court, and his claim rejected upon a real consideration of the facts and sufficient reasons. But as SCOTT, L.J., pointed out during the argument, there are always in these cases two sides to be considered. The defendant has his rights, as well as the plaintiff, and it has to be considered, among other matters, whether a defendant, a foreigner, should or should not be brought before tribunals in this country by reason of this particular machinery, which apparently, at any rate abroad, is not fully recognised as part of the judicial methods. But, in an appropriate case, leave to serve ought to be given as the order states. In my opinion, however, when this case is investigated, it is essentially a case where one cannot support the view at which the learned judge arrived. Had he given full weight to the substance of the case, the merits of the case, and the grounds on which the plaintiff asks for leave to serve out of the jurisdiction, it is clear that this is a case in which the judge ought to have refused leave. These appeals should, therefore, be allowed.

SCOTT, L.J. : I agree with the judgment that has been delivered by my Lord, and would like to add a few words on the two cases, one by one. I express no opinion on the submission of Mr. Holmes in his case, *Kroch v. Rossell et Compagnie Société des Personnes à Responsabilité Limitée*, that the judge had no jurisdiction, on the ground that there was no evidence of a publication by the defendants here properly brought before the court. I take that course because I am quite clear that, on the other ground, we ought to allow the appeal. That ground is a ground of fact, rather than one of law. The law is quite clear, as laid down in the cases cited by SLESSER, L.J., and also in *The Hagen* (4), cited by Mr. Holmes, and particularly in the judgment of FARWELL, L.J. The passage in his judgment, at p. 201, is a passage that depends upon general principles affecting service out of the jurisdiction, and does not depend upon any distinction between the particular heads in R.S.C., Ord. 11, r. 1, under the different letters of that rule. The principle is that which was stated by PEARSON, J., in the case which FARWELL, L.J., referred to, *Société Générale de Paris v. Dreyfus Bros.* (5), where PEARSON, J., said at pp. 242, 243 :

It becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that [which he has discussed] it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one

say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

That principle was endorsed in the House of Lords in *Johnson v. Taylor Brothers & Co., Ltd.* (2), and particularly in the judgment of

A LORD BUCKMASTER, at pp. 160, 161 :

It must, however, be remembered that the issue of the writ, even in a case within the words of the rule, can only be made by leave of the court, and in granting such leave, regard ought to be had to the real breach in respect of which the action is brought, and not merely to a breach on which it is necessary to rely, not to obtain relief, but only to found jurisdiction under the rule.

- B It is quite true that that observation was addressed to the facts of that case, where the distinction is drawn between a fundamental breach of contract and a breach of a quite subordinate stipulation of the contract, but the point of the observation is that the reality of the question ought to be looked at, and, if the reality of the cause of action is one which
- C belongs to a foreign country, and not to this country, and, above all, where it is a question which probably would be better tried, for any particular reason which appears in the circumstances of the case, in the foreign country, leave ought not to be granted. In this particular case, where a writ was issued for libel, the libel consists of a paragraph, which
- D appeared in the French paper *Le Petit Parisien*. It describes what we should call police proceedings with a view to a prosecution for fraudulent share pushing. Those proceedings are, of course, being conducted in accordance with French criminal procedure in the French language, and all the steps in relation to it are steps understood by French lawyers,
- E and understood by a French jury. France is obviously the right place to try the issue in this action, the right jurisdiction to try that issue, unless there are strong grounds of justice which require that, in the particular claim that is brought, the plaintiff should be allowed to bring it within this jurisdiction. I can see none here. I agree with what my
- F Lord has said, and will not repeat it, but it does seem to be perfectly clear that the substantial complaint of the plaintiff, if he has a good ground for bringing his action, is one that ought to be investigated in France, where the paper has an immense circulation, where, if anywhere, his reputation must have been damaged, and where, if the
- G defendants desire, as Mr. Murphy says they do desire, to justify, they will be able to justify in a court where the proceedings and the justification can be understood. For those reasons, I think that, in the case of *Le Petit Parisien*, the action should be left to be tried in France, where the defendant company is domiciled, resident, and carries on its business,
- H and publishes the vast majority of the copies of the paper that it prints.

With regard to the other case, the considerations are similar. They are not identical, because the paragraph published in the Belgian paper, *Le Soir*, is a paragraph that obviously comes from the same pen, and relates to the same facts as the paragraph on the same day in *Le Petit*

Parisien. The proceedings, therefore, are in Belgium, and not in France, but I suppose I may take judicial notice of the fact that the law of Belgium is closely similar to the law of France in regard to criminal procedure, and the language in which this particular paper is published is the French language. Consequently, there is every reason for feeling certain that the whole of the case is much more easily explicable to a Belgian court than to an English court, particularly to an English jury. For that reason, I think our decision ought to be the same in the case of the Belgian paper as in the case of the French paper. I add, finally, that I think it would be ridiculous and fundamentally wrong to have these two cases tried in this country, on a very small and technical publication, when the real grievance of the plaintiff is a grievance against the widespread publication of the two papers in the respective countries where they are published.

Appeals allowed.

Solicitors: *Lewis & Lewis* (for the first appellants); *Freshfields, Leese & Munns* (for the second appellants); *Spring & Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

GREEN v. KURSAAL (SOUTHEND-ON-SEA) ESTATES, LTD.

[KING'S BENCH DIVISION (Goddard, J.), **February 12, 15, 1937.**]

Theatres and Entertainments—Sunday entertainments—Advertising—Newspaper—Sunday Observance Act, 1780 (c. 49), s. 3.

Limitation of Actions—Statutory bar—Amendment of pleadings after expiration of statutory period—Sunday Observance Act, 1780 (c. 49), s. 5.

A newspaper issued on Aug. 8, 1936, included an advertisement as follows: "Kursaal Gardens. Amusement Park and Attractions open daily (including Sundays). Dancing." An informer claimed penalties under the Sunday Observance Act, 1780, against the defendants for advertising entertainments on Sundays, they being the printers and publishers of the newspaper:—

HELD: (i) the defendants were not advertisers within sect. 3 of the Act. The claim should have been brought against the defendants as printers or publishers under the same section.

(ii) an amendment of the claim ought not to be allowed as 6 months had elapsed since the alleged offence, and to allow an amendment would be to allow an action to be brought after the expiration of the period of limitation applicable to the proceedings under sect. 5 of the Act.

(iii) the advertisement in its terms was an advertisement of a place and not of an entertainment, and no offence had been committed against sect. 3 of the Act.

[EDITORIAL NOTE.] This action failed *in limine* because the plaintiff, not having availed himself of professional assistance, was unable to overcome certain technical and procedural difficulties in an action for penalties. On the matter of amendment at trial and the questions of who is an advertiser as distinct from a printer

and publisher, and what is an advertisement of an entertainment as distinct from an advertisement of a place, the judgment contains interesting passages, and those are here reported. Upon the point under the provisions limiting the bringing of such proceedings to 6 months after the offence the case may be compared with

- A *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83 ; Digest Supp.
 AS TO THE SUNDAY OBSERVANCE ACT, 1780, see HALSBURY, 1st Edn., Vol. 27, Theatres, pp. 423, 424, paras. 840, 841 ; and FOR CASES, see DIGEST Supp., Theatres, Nos. 164 (a) *et seq.*

Cases referred to :

- B (1) *Orpen v. Haymarket Capitol, Ltd.* (1931), 145 L.T. 614 ; Digest Supp.
 (2) *A.-G. v. Walkergate Press, Ltd.* ; *A.-G. v. Bloomfield* ; *A.-G. v. Carlton* (1930), 142 L.T. 408 ; Digest Supp.

- C ACTION for penalties under the Sunday Observance Act, 1780, against 6 defendants in respect of the alleged opening of the Kursaal, Southend-on-Sea, for entertainments on Sundays, July 26, Aug. 9 and Aug. 16, 1936, and advertisements of the same. The case is reported only upon the claim for £400 penalties against John H. Burrows & Sons, Ltd., for advertising the alleged entertainments in the issues of, *inter alia*, the *Southend Pictorial Telegraph* on July 25, and Aug. 8, 1936, of which
 D publication they were the printers and publishers.

The plaintiff in person.

Sir William Jowitt, K.C., and *G. O. Slade* for Kursaal (Southend-on-Sea) Estates, Ltd., and Frederick Ernest Williams, the managing director of the Kursaal.

- E *Gilbert Beyfus, K.C.*, and *Gilbert Paull* for Southend-on-Sea Kursaal Water Chute and Gravity Rides, Ltd.

Cyril Salmon for John Hames.

Roland Burrows, K.C., and *Hon. Quintin Hogg* for John H. Burrows & Sons, Ltd.

- F *Percy Lamb* for Printers and Publishers (S.E.), Ltd.

- Upon the evidence GODDARD, J., found that it was not proved that the Kursaal was open for or being used as a place of public entertainment or amusement on any Sunday. Many difficulties arose from the appearance of the plaintiff in person in an action which, being a penal
 G action, GODDARD, J., required to be strictly proved.

GODDARD, J. : The Sunday Observance Act, 1780, s. 3, provides :

- H And for the better preventing persons assembling on the Lord's Day for such irreligious purposes as aforesaid, be it further enacted by the authority aforesaid, that any person advertising or causing to be advertised any publick entertainment or amusement or any publick meeting for debating on any subject whatsoever on the Lord's Day, to which persons are to be admitted by the payment of money or by tickets sold for money, and any person printing or publishing any such advertisement, shall respectively forfeit the sum of £50 for every such offence to any person who will sue for the same.

On Aug. 8, 1936, more than 6 months ago, and the Act it will be noted,

provides by sect. 5 that no action shall be brought for penalties under the Act unless the same be brought within 6 calendar months next after the offence committed, John H. Burrows & Sons, Ltd., published the following advertisement in the *Southend Pictorial Telegraph* :

Kursaal Gardens, Southend-on-Sea. "The One Bright Spot." Season 1936. Amusement Park and Attractions Open Daily (including Sundays) until October. Dancing.

Then it advertises a cinema, and billiards, a large car-park, and fully licensed bars. On this, Mr. Roland Burrows takes three points in substance. First of all, he says, a limited company cannot commit those offences, because the Act not only provides for penalties but also provides that persons who commit the offences shall be liable to the other penalties which may be imposed upon the keepers of disorderly houses. I do not think it is necessary to give a concluded decision upon this point, because, in my view, I find the claim fails upon other grounds. But, if I had to give a decision on whether or not a limited company could commit this offence, I should follow the decision of ROWLATT, J., in *Orpen v. Haymarket Capitol, Ltd.* (1) rather than that of HORRIDGE, J., in *Attorney-General v. Walkergate Press, Ltd.* (2). It is true that the decision of HORRIDGE, J., does not appear to have been cited to ROWLATT, J., but the case ROWLATT, J., decided was a case under the Sunday Observance Act, whereas the case HORRIDGE, J., decided was a case under the Lotteries Act. HORRIDGE, J., in his decision, laid great stress on the fact that, under the Lotteries Act, a person promoting a lottery was liable to be treated as a rogue and vagabond, and I think that was the main ground on which he held that a limited company could not be a person within the meaning of the Lotteries Act. ROWLATT, J., had this very Act under consideration, and he thought, and, if I may say so, I respectfully agree with the learned judge, so far as it is necessary for me to express any opinion upon it at all, that a limited company could be liable for penalties under this Act, and that an informer is entitled to succeed in a claim against a company for the penalties, although it may be that the limited company could not be prosecuted further, criminally, for the penalties for keeping a disorderly house. But that is not the only difficulty in the plaintiff's way. The Act provides for penalties on four different persons: advertisers, persons who cause to be advertised any public amusement, the printers, and the publishers. There are four different classes of people. Mr. Green here has sued John H. Burrows & Sons, Ltd., as the advertisers. It is true that he says, in his statement of claim, that they advertised this entertainment, or cause it to be advertised, because they printed and published; but in the operative part of his statement of claim he charges them, it seems to me, as advertisers. I do not think they are advertisers within the meaning of this section. Nor do I think they are persons who caused

- the entertainment to be advertised. The statute differentiates between advertisers and persons who cause an entertainment to be advertised and printers or publishers, and where it is found that the person sued is only a printer and publisher it seems to me that he cannot be held at the same time, to be a person who advertises, or causes the entertainment to be advertised. I think the first words in the Act refer to the person who causes the advertisement to be printed and published and pays for it, and the latter part of the section hits the person who actually prints and actually publishes. It is true that the penalty is the same, but the offences seem to be different ; and, if it were a matter of indictment, and a person were charged that he advertised, and it turned out that he only printed the advertisement, it seems to me he would be entitled to be acquitted, on the ground that he had been indicted under the wrong words of the section.
- Mr. Green says I ought to allow an amendment. In exercising my discretion, I think I should refuse to amend in this case ; I doubt whether I even have any power to amend, because 6 months have elapsed since the advertisement was published on Aug. 8, 1936, and to allow Mr. Green to turn his action against John H. Burrows & Sons, Ltd., as the advertisers into an action against them as printers, would be to allow him, in effect, to bring an action against them more than 6 months after the offence has been committed.

There is another point which I think is fatal to Mr. Green's claim. I think Mr. Rowland Burrows's point is right. I do not think this is an advertisement of a public entertainment or amusement or a public meeting ; it is an advertisement of a place. If you were to go to the place, you might find a certain entertainment going on ; but I do not think this is an advertisement of an entertainment in the sense that you find, for instance, in regard to a concert or a boxing display advertised at the Albert Hall. If it were a mere advertisement of the Albert Hall, saying that the Albert Hall is opened on Sundays for concerts and other attractions which are provided, I doubt whether there would be an offence within the meaning of the section. I think the section is aiming at the advertisement of a particular amusement or entertainment. Therefore I do not think that an advertisement which merely states that the Kursaal at Southend has amusements and attractions, without specifying in any way what amusements or attractions there are, is an offence against the Act. It is true that, in this advertisement, there is a reference to dancing, which, in other advertisements, is said not to take place on Sundays. It is true there is a reference to a cinema, and to billiards. But I do not think it is an advertisement stating that on Sundays you can go and dance to the rhythm of a particular band, or that on Sundays there is necessarily a cinema, or that you can play billiards, because I am certain that was never intended.

I think that this is an advertisement of a place, and not of a public entertainment or public meeting within the meaning of this Act; and, accordingly, I think on that ground, too, this action fails.

Action dismissed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *F. T. Fisher*, Southend-on-Sea (for *Kursaal (Southend-on-Sea) Estates, Ltd.*, *Frederick Ernest Williams*, and *Southend-on-Sea Kursaal Water Chute and Gravity Rides, Ltd.*); *Crossman, Block & Co.* (for *John Hames*); *Bird & Bird*, agents for *H. J. Jefferies & Co.*, Southend-on-Sea (for *John H. Burrows & Sons, Ltd.*, and *Printers and Publishers (S.E.), Ltd.*).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

MILLENSTED v. GROSVENOR HOUSE (PARK LANE), LTD.

[COURT OF APPEAL (Slessor and Scott, L.JJ., and Farwell, J.),
February 5, 11, 1937.]

Practice—Payment into court—Communication to judge—Oral judgment giving damages—Disclosure of payment into court—Alteration of quantum of damages in formal judgment—Jurisdiction—R.S.C., Ord. 22, r. 6.

The plaintiff had been successful in an action for personal injuries and was awarded £50 damages, and costs on the High Court scale. It was then disclosed that £20 had been paid into court. Judgment was given for £50, and county court costs. On a further application, made the next day, for costs on the High Court scale, the judge stated that he thought £50 was excessive, and ordered judgment to be entered for £35, and costs on the county court scale. The plaintiff appealed, on the ground that, once the judge had been informed that money had been paid into court, he had no jurisdiction to hear the matter further:—

HELD: (i) R.S.C., Ord. 22, r. 6, is directory, not imperative. If the knowledge that there has been a payment in could not reasonably cause any miscarriage of justice, the judge may exercise his discretion and allow a case to proceed.

(ii) the rule does not prejudice the power of a judge to alter his oral judgment at any time before it is formally drawn up and entered.

[EDITORIAL NOTE. R.S.C., Ord. 22, r. 6, was introduced in 1933. Before that date the judge knew of the payment in because it had to be pleaded in the defence. After that date, under the present rule, neither the judge nor the jury, if there is one, are to be informed of the fact that payment in has been made. The rule, however, is held not to be imperative, so that any inadvertence in this respect does not vitiate the whole proceeding and necessitate a new trial.

FOR R.S.C., ORD. 22, R. 6, see YEARLY SUPREME COURT PRACTICE, 1937, pp. 370, 371; and FOR CASES, see DIGEST, Practice, pp. 498, 499, Nos. 1730-1735. See HALSBURY, 1st Edn., Vol. 23, Practice, pp. 151, para. 268.]

Cases referred to:

- (1) *Re St. Nazaire Co.* (1879), 12 Ch. D. 88; Digest, Practice, 815, 3759.
- (2) *Re Australian Direct Steam Navigation Co., Miller's Case* (1876), 3 Ch. D. 661; *on app.* (1877), 5 Ch. D. 70; 9 Digest 453, 2943.

(3) *Re Suffield & Watts, Ex p. Brown* (1888), 20 Q.B.D. 693; Digest, Practice, 815, 3762.

(4) *Klamborowski v. Cooke* (1897), 14 T.L.R. 88; Digest, Practice, 498, 1731.

(5) *Williams v. Goose*, [1897] 1 Q.B. 471; Digest, Practice, 498, 1730.

A (6) *Jaques v. South Essex Waterworks Co.* (1904), 20 T.L.R. 563; 30 Digest 246, 456.

(7) *Jenkins & Co. v. Simon*, [1926] 1 K.B. 111; Digest Supp.

APPEAL from a judgment of HILBERY, J., dated May 14, 1936.

B The facts in the case are fully set out in the judgments. R. S. C., Ord. 22, r. 6, provides :

C Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into court under the preceding rules of this order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided, but the judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment.

D *D. N. Pritt, K.C.*, and *Samuel Lincoln* for the appellant : By R.S.C., Ord. 22, r. 6, the court is protected from any knowledge of a payment into court until the question of damages has been decided. A judge should not alter his judgment after he has been told of the amount paid in ; otherwise he cannot deal with costs until the judgment has been entered. If the costs have been dealt with, the judge cannot alter the quantum of damages ; in the alternative, if the final amount awarded in this case is the true judgment, then it was made in breach of R.S.C., Ord. 22, r. 6, and there must be a new trial. [Counsel referred to *Jenkins & Co. v. Simon* (7), *Re Suffield & Watts, Ex p. Brown* (3), and *Williams v. Goose* (5).]

F *W. A. Fearnley-Whittingstall* for the respondent : It cannot be said that the amount of damages was reduced in order to be able to reduce the costs. R.S.C., Ord. 22, r. 6, applies only where there has been a miscarriage of justice. It is a rule of practice, and, if it is infringed, the knowledge does not disqualify the judge. It is a matter for his discretion as to whether the knowledge would affect him at all. Under the old rule, where there is a jury, one cannot be certain whether or not their minds have been affected ; a judge is not on the same basis. [Counsel referred to *Jaques v. South Essex Waterworks Co.* (6) and *Klamborowski v. Cooke* (4).]

Pritt, K.C., in reply.

H SLESSER, L.J. : In this case, the plaintiff complained that she had been damaged by the negligence of a servant of the defendant company in upsetting a jug of hot water upon her, whereby she suffered injury, a severe scalding of the left upper arm, and shock. The case was tried before HILBERY, J., on May 13, 1936, without a jury, and he came

to the conclusion that the negligence was proved, and by his oral judgment awarded her £50 damages, to include special damage of £4 14s. Mr. Fearnley-Whittingstall, for the defendant company, thereupon asked that costs should be awarded on the county court scale, but HILBERY, J., pointed out that the sum awarded, of necessity, carried costs on the High Court scale. The judge having given his decision, Mr. Fearnley-Whittingstall stated to the judge that there was the sum of £20 in court, which, on the request of Mr. Lincoln, for the plaintiff, was ordered to be paid out, and judgment for £50, with costs, ordered. The learned judge refused to certify for High Court costs, but ordered such costs as would have been ordered if the case had been brought in the county court. He added :

I think I have stretched this matter in arriving at the sum of £50.

Next day, on a further application to the learned judge, he stated that he thought £50 was excessive, and, by formal judgment, dated and entered that day, May 14, 1936, he ordered that the plaintiff recover from the defendant company £35 with costs to be taxed as would have been allowed in the county court. The plaintiff appeals against this order, on the ground that the judge, having heard that £20 had been paid into court, before he had given his final decision, was not competent thereafter to enter judgment for a sum different from that which, before any mention of the payment into court had been made to him, he had stated orally to be due to the plaintiff. It was not sought to be disputed by Mr. Pritt that it is within the power of a judge at any time before judgment is entered and perfected to alter its terms. This is the effect of two judgments, *Re St. Nazaire Co.* (1), where it was held, following *Re Australian Direct Steam Navigation Co.*, *Miller's Case* (2), that a judge can always reconsider his decision until the order has been drawn up, and *Re Suffield & Watts, Ex p. Brown* (3), to the effect that, so long as the order has not been perfected, the judge has the power to reconsider the matter, but when once the order has been completed, the jurisdiction of the judge over it has come to an end. (Per FRY, L.J., at p. 697 per LOPES, L.J., at p. 698.) Faced with these decisions, Mr. Pritt advanced an argument based upon R.S.C., Ord. 22, r. 6. That rule provides, with exceptions not here applicable, that no statement of the fact that money has been paid into court shall be inserted in the pleadings, and no communication of the fact shall, at the trial of any action, be made to the judge or jury, until all questions of liability, and amount of debt or damages, have been decided. It is contended by Mr. Pritt, that, although, on the question of liability, the formal judgment on May 14 did not differ from the judgment on May 13, the amount of damage was not finally decided until the formal judgment on May 14 was drawn up and perfected, at which time communication of the fact that money had been paid into court had been made to the judge, in contravention of R.S.C., Ord. 22,

r. 6; and this contravention, he maintains, has, by its very nature, produced such danger of miscarriage of justice as to make necessary a new trial.

To test this matter, I will assume that the mention of the payment into court had been made to a judge or jury, before he delivered judgment, in a case where the oral judgment and the written order agreed in all respects. In my opinion, in such a case, a departure from rule would not, of itself, compel the judge to refuse to continue to hear the case, nor, if he did continue to hear it, in his discretion, would it be a ground for this court to order a new trial. The part of the rule, in my opinion, dealing with this matter, like the earlier limb, which says no mention of payment into court shall appear in the pleadings, is directory, and not compulsive; that is to say, a judge, in his discretion, when such matter was mentioned to him or the jury, if he were of opinion that the statement as to payment in could not reasonably be calculated to cause any miscarriage, would be entitled to allow the case to proceed. R.S.C., Ord. 22, r. 6, which now extends both to judge and to jury, was formerly limited to the case of the jury only. Under the old r. 22 it was provided that, where a cause or matter is tried by a judge and jury, no communication to the jury, either of the fact that money has been paid into court or of the amount paid in, shall be made, until after verdict is given. In *Klamborowski v. Cooke* (4), counsel had stated to the jury, in opening the pleadings, that the defendant had paid money into court. This course was objected to by the defendant, on the ground that it was contrary to R.S.C., Ord. 22, r. 22, but LORD RUSSELL OF KILLOWEN, L.C.J., said that, in his opinion, the rule was a very foolish one, and worked very inconveniently, and he, himself, told the jury that the defendant had paid £5 into court. In *Williams v. Goose* (5), the rule was stated by the court to be one relating merely to procedure, and, on an argument that the rule was *ultra vires*, on the ground that making rules under the Judicature Act is confined to matters of procedure, and cannot be exercised so as to effect the substantive rights of litigants, it was decided that the rule, being merely procedural, was *intra vires* the Judicature Act. In *Jaques v. South Essex Waterworks Co.* (6), LORD ALVERSTONE, L.C.J., stating that he thought R.S.C., Ord. 22, r. 22, applied where payment in was accompanied by an admission of liability, merely added that he thought the better view was that payment in should not be mentioned.

Finally, Mr. Pritt argued on construction that the application of R.S.C., Ord. 22, r. 6, made it now impossible to say that, when payment into court had been mentioned to a judge, he could draw up an order different from that contained in the oral decision which he had made before that mention. This contention cannot be supported on principle. If the

right view is, as we are told by authority, that there is no effective judgment until it is drawn up, and that, up to that time, the judge is not *functus officio*, such a basic notion cannot be upset by the mere application of an inference derived from the inconvenience of applying it in the circumstances contemplated by a particular rule. Whatever may be the merits of an argument supporting a new trial, the argument that the oral judgment is final in cases where payment in has been stated to the judge, and not otherwise, is contrary to the very nature of a judgment. A

This appeal, therefore, fails, and must be dismissed, with costs. B

SCOTT, L.J. : I agree. It is to be observed that R.S.C., Ord. 22, r. 6, applies, as did the old r. 22, before 1933, even where payment in is made with admission of liability. The prohibition is supported by no sanction : nothing is said as to what is to happen if the rule is broken. It was argued by Mr. Pritt that a breach affected the jurisdiction of the judge, to the extent of depriving him of his normal freedom to alter his oral judgment down to the moment of its being formally drawn up. But I cannot understand any such partial paralysis of jurisdiction ; it must be all or nothing. However, even if his contention were right, the appellant could not succeed in her appeal, at most it would entitle her to a new trial. But I do not think any such sanction can be read into the rule by implication. As the words stand, they constitute a direction to counsel, parties, and witnesses, the observation of which the framers of the rule thought was generally in the interest of the administration of justice ; and I think that a dereliction from the duty so indicated is an incident which the judge trying the case is left free to deal with, in his complete discretion, acting under the inherent jurisdiction of the court, according to the actual circumstances of the case in which the incident happens. I think that that is so, whether the trial be before a judge and jury, or a judge alone. C D E F

It is to be observed that the rule does intend communication of the fact of payment in to be made before the judgment is perfected by entry ; for it assumes that the judge will be told about payment in for the purpose of his order as to costs ; and, as the rule must have been drawn with an eye to the invariable practice of discussing costs immediately after delivery of the oral judgment of the court, it follows that it could not have been intended to prejudice the power of the judge to alter his oral judgment at any time before it is formally drawn up and entered. G H

FARWELL, J. : It is now well settled that, until an order made by a judge has been perfected, by being passed and entered, there is no final order, and, consequently, the judge may, at any time until the order is so perfected, vary or alter the order which he had intended to make :

Re Suffield & Watts, Ex p. Brown (3). No objection, can, therefore, be taken, merely on the ground that the order, as drawn up, differs from the order that the learned judge originally stated he would make. It is said, however, that, having regard to the provisions of R.S.C., Ord. 22. r. 6, it was not open to the judge, after he had once been informed that money had been paid into court, to deal with the matter any further, and that, accordingly, the order which he originally proposed to make must stand as the final order, or that there should be a new trial. The prohibition contained in R.S.C., Ord. 22, r. 6, originally applied only in an action tried by a judge and jury, and had no application to a trial by a judge alone, but it has now been altered, and applies in both cases. The purpose of the order is obvious. It was made to prevent the premature disclosure of a fact which was not relevant to the issues to be tried, but the disclosure of which might prejudice one or more of the parties to the proceedings. It is to be noticed that the order makes no express provision for the event of an infringement of the rule. It is, of course, the duty of both judge and counsel to observe the rule, but what is to be done if the rule, by inadvertence or otherwise, is broken? In my judgment, this is in every case a matter for the trial judge to determine, having due regard to the object for which the rule was made. If he thinks it proper or necessary for the due administration of justice, he may refuse to hear the action any further, and direct it to be tried before another tribunal. On the other hand, if he is satisfied that no injustice will be done, he may allow the matter to proceed, and, if he adopts the latter course, that, in itself, affords no ground for an appeal from the order which is ultimately made.

In the present case, the only objection taken to the order made herein is that it was made after the judge had been told that £20 had been paid into court, and, as I have already said, that alone is not sufficient to support this appeal, which, in my judgment, fails, and should be dismissed.

Appeal dismissed with costs.

Solicitors: *Turner, Osborn & Chatterton* (for the appellant); *William Easton & Sons* (for the respondent company).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

Re BLAKE, BERRY *v.* GEEN.

[COURT OF APPEAL (Slesser and Scott, LJJ., and Farwell, J.),
January 28, 29, February 5, 1937.]

Perpetuities—Accumulations—Will—Annuities payable out of residue—Accumulation of surplus income—Residuary legacy after death of last annuitant—Determination of trust for accumulation of surplus—Law of Property Act, 1925 (c. 20), s. 164. A

The testator devised his residuary estate to his trustees upon trust to pay a number of annuities out of the income thereof, and he directed that any surplus income should be accumulated and invested so long as any of the annuitants were alive; should there, however, be a deficiency in any one year, it might be made up from the surplus income in any other year. Subject to these provisions, he gave the whole of his property, after the death of the last personal annuitant, to a residuary legatee upon certain trusts. It transpired that the annual income far exceeded the amount required to pay the annuities. The residuary legatee asked that the trust for accumulation should be determined, and that, subject to proper provision being made for payment of annuities and legacies the residuary estate should be transferred to it :— B C

HELD : (i) any deficiency in the annuities could be made up from the surplus income in any year as the annuities were charged on the whole residuary estate.

(ii) as the accumulations would cease at the expiration of 21 years from the testator's death, the surplus income after that date would devolve as on an intestacy. No order for transference of the residuary estate to the residuary legatee could therefore be made, and this was so for the further reason that some of the surviving annuitants refused to consent to such an order. D

[EDITORIAL NOTE.] It is always desirable that the administration of an estate should be ended as soon as possible, but this may only be effected either with the consent of all parties interested being *sui juris* or by an order of the court. The court will not, however, make the order unless all parties consent, nor unless the rights of all parties can be fairly determined at the time the order is made. In the present case the accumulations must stop upon the expiration of 21 years from the testator's death, and, if any of the annuitants survived that date, the surplus income would go as on an intestacy with the result that a new class of beneficiaries would be brought into the matter. The court in such circumstances found itself unable to make any order for transference of any part of the residuary estate to the residuary legatee. E F

FOR THE LAW ON THE POINT see HALSBURY, 1st Edn., Vol. 22, *Perpetuities*, pp. 382, 383, paras. 779-782; and FOR CASES, see DIGEST, Vol. 37, pp. 147-149; Nos. 727-752.] G

Cases referred to :

- (1) *Saunders v. Vautier* (1841), Cr. & Ph. 240; 44 Digest 444, 2691.
- (2) *Wharton v. Masterman*, [1895] A.C. 186, affg. *Harbin v. Masterman*, [1894] 2 Ch. 184; 44 Digest 444, 2689. H
- (3) *Harbin v. Masterman*, [1896] 1 Ch. 351; 23 Digest 400, 4714.
- (4) *Re Deloitte, Griffiths v. Deloitte*, [1926] Ch. 56; 37 Digest 149, 752.
- (5) *Harbin v. Masterman* (1871), L.R. 12 Eq. 559; Digest Supp.
- (6) *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; 37 Digest 146, 724.
- (7) *Re Howarth, Howarth v. Makinson*, [1909] 2 Ch. 19; 43 Digest 676, 1071.

(8) *Re Watkins' Settlement, Wills v. Spence*, [1911] 1 Ch. 1; 39 Digest 146, 408.

(9) *Re Travis, Frost v. Greatorex*, [1900] 2 Ch. 541; 37 Digest 147, 725.

APPEAL from a decision of BENNETT, J., dated Feb. 13, 1936. The facts are fully set out in the judgment.

A *F. K. Archer, K.C.*, and *Wilfrid Hunt* for the appellant, Sidney Malcolm Berry, the secretary of and suing on behalf of the Congregational Union of England and Wales.

A. P. Vanneck for the executor, the respondent Harry Geen.

B *Sir Gerald B. Hurst, K.C.*, and *Gerald R. Upjohn* for the testator's widow.

Fergus D. Morton, K.C., and *A. J. Belsham* for the Newton Abbot Congregational Church.

C. L. Fawell for the defendant, Frederick John Cornish, representing the Devon Congregational Union.

C *Charles Harman, K.C.*, and *A. C. Nesbitt* for Mrs. James and Mrs. Bloomer, heir-at-law and next of kin.

A. Andrewes Uthwatt for the Attorney-General.

Archer, K.C.: Where there is a gift of residue, subject to the payment of annuities, the residuary legatees can always call for the fund to be transferred to them, subject to proper provision being made for the annuitants; that is so whether or not there are directions to accumulate the surplus income, and it makes no difference whether such directions are valid, void, or partly invalid. In *Harbin v. Masterman* (3), the residue was distributed in spite of opposition. The will does not include any gift to the next of kin; the annuitants' claims can be satisfied before the statutory period has expired, so that the rights of the next of kin would not arise. [Counsel referred to *Saunders v. Vautier* (1); *Re Deloitte, Griffiths v. Deloitte* (4); *Harbin v. Masterman* (5); *Harbin v. Masterman* (3); *Wharton v. Masterman* (2); and *Weatherall v. Thornburgh* (6).]

Hunt, following for the appellant: On the true construction of the will the annuitants have no interest in the accumulations because they are limited to the income from the original residuary estate. A deficiency is carried forward as a charge only upon any future surplus income of the original residuary estate.

Fawell: There is an inconsistency in the judgment below: it is said that the appellant was the true residuary legatee, and that there may be a gap between Jan. 1, 1946, and the death of the last annuitant. But if the appellant is the true residuary legatee, the next of kin or heir-at-law can have no interest.

Hurst, K.C.: "The surplus income of any other year" means the surplus income in any year other than the one in which there is a deficiency; it may be a previous year. The principle that where residue is given subject to annuities, the residuary legatees can call for the

fund subject to proper provision for the annuitants, only applies where there is no direction to accumulate. But if any annuitant has an interest such a direction is enforceable, and the Thelusson Act will be effective after 21 years. In *Wharton v. Masterman* (2), the annuitants had no interest in the accumulations; here they have an interest and the court should enforce the trust. [Counsel referred to *Re Howarth, Howarth v. Makinson* (7); *Re Watkins' Settlement, Wills v. Spence* (8); *Weatherall v. Thornburgh* (6); and *Re Travis, Frost v. Grestorex* (9).]

Harman, K.C.: The rights of the next of kin cannot be destroyed, even with the consent of all the annuitants.

Archer, K.C., in reply: The next of kin can assert no equity. They are not mentioned in the will. There is no gap in this case; the only source of such a gap would be a gift in the will; there is no such gift and the next of kin cannot be heard.

FARWELL, J. [delivering the judgment of the court]: The testator, Charles Davey Blake, who died on Jan. 1, 1925, made his will on Sept. 14, 1920, and thereby appointed Charles Geen and Harry Geen to be his executors and trustees. Mr. Charles Geen has since died, but Mr. Harry Geen is a defendant to the originating summons. By his will, the testator, after disposing of certain specific property, gave and devised all his property, both real and personal, to his trustees upon trust to pay out of the income thereof a large number of annuities; and he divided the annuities into six groups, and directed that they should be paid in the order and preference of those groups. The sixth group contained annuities to certain religious institutions, and the testator directed that those last annuities should determine on the death of the last of the personal annuitants. On the death of the last of the personal annuitants, the testator gave legacies to certain charitable objects, and, after declaring that the above-mentioned legacies and annuities were given free of all death duties, he further directed that, so long as any of the annuitants were alive, the balance of the income of the residuary estate, and the income resulting therefrom, should be accumulated and invested, but that any deficiency in one year might be made up from the surplus income of any other year, and, subject as aforesaid, he gave the whole of his property, after the death of the last personal annuitant, to the Congregational Union of England and Wales, to be invested as capital, as to one half of the net income thereof, upon trust to pay the same to the Devon Congregational Union. Both the last-mentioned charities are unincorporated bodies. The secretary of the first of these charities, suing on behalf of the charity, is the plaintiff in the action, and the appellant here, and the treasurer of the other charity, as representing it, is a defendant, and one of the respondents.

The testator, at his death, was possessed of very considerable property,

A his personal estate being valued at £338,828 16s. 8d., and his real estate at £22,030 5s. 11d., making a total of £360,859 2s. 7d. Since the death of the testator, certain of the annuitants have died, and the subsisting annuities at the present time amount to £2,274 19s. 3d. The income of the whole estate very greatly exceeds that sum, the surplus income at the present time being approximately £12,000. In these circumstances, the residuary legatees, not unnaturally, desire that the trust for accumulation should be put an end to, and that either the surplus income in each year should be paid to them, or proper provision should be made B for payment of the legacies and annuities, and that, subject thereto, the residuary estate should be transferred to them; and it was for the purpose of having it decided whether they are so entitled that this originating summons was taken out.

C The matter came before BENNETT, J., and, by an order, dated Feb. 13, 1936, it was declared (i) that the gift in the will to the appellant of the whole of the testator's property included the accumulations of income and the income resulting therefrom, but (ii) that the appellant was not entitled to determine any future accumulations, and that, in the event of any of the annuities continuing beyond Jan. 1, 1946, the surplus income D of the residuary estate, and of the accumulations from that date until the cesser of the last annuity, would be undisposed of, and devolve as on an intestacy. The plaintiff appeals from that order, so far as it declares that he is not entitled to have the accumulations determined. There is no appeal from the first declaration in the order.

E In order to determine whether the second declaration made by the learned judge is right, it is necessary first to decide, as a matter of construction, what the rights of the annuitants are. *Prima facie*, where F residue is given subject to annuities, the annuities are charged on the whole of the residue; but it is argued that, in this case, this is not the true construction, and that the direction in the will, that any deficiency G in income in one year may be made up from the surplus income of any other year, means that the deficiency can be made up only out of the income of any future year, and that, on this construction, this case does not come within the general rule. In our judgment, this contention is not well founded. We see no reason for construing the words "the income H in any one year" as confined to the income of any future year, and, accordingly, on the true construction of this will, the annuitants have a charge on the whole of the testator's residuary estate. Further, in our judgment, the learned judge was right in declaring that, if any of the annuitants survive the period of 21 years from the testator's death, when the accumulations will cease by virtue of the Law of Property Act, 1925, s. 164, down to the death of the last surviving annuitant, the surplus income will be undisposed of, and pass as on an intestacy.

The present position, therefore, is that the only persons presently interested in the residuary estate of the testator are the annuitants, the pecuniary legatees, and the residuary legatees, but that, in certain circumstances, the heir-at-law and next of kin of the testator may become entitled to the enjoyment of the surplus income for a limited A period. In those circumstances, are the residuary legatees entitled to the relief which they seek?

It is now well settled that, where a person is, or a number of persons collectively are, given property absolutely, but the date of enjoyment is postponed, if the persons so entitled are all *sui juris*, and consent, B the direction postponing payment is inoperative, and of no effect, on the ground that the attempt to restrict the enjoyment of property given absolutely to persons who are *sui juris* is repugnant to the absolute gift. The leading authority for this is the well known case of *Saunders v. Vautier* (1). It must, however, be remembered that that rule has no C operation unless all the persons who have, or may have, any interest whatsoever in the subject matter of the gift are *sui juris*, and consent, and that, unless these conditions are fulfilled, there is no legal right in the ultimate beneficiaries to immediate enjoyment, and the conditions annexed to the gift must be complied with. See *Wharton v. Masterman* (2). In certain circumstances, however, the Court of Chancery, D in the administration of an estate or the execution of a trust, will permit the ultimate beneficiaries to have immediate enjoyment of the property given to them, notwithstanding that there are other persons, having an interest in the property, who object. For instance, when the residuary E estate is given absolutely to a person who is *sui juris*, but charged with annuities, in such a case the court may, if it thinks fit, make an order giving the residuary legatee immediate possession of the residue. See *Harbin v. Masterman* (3), at p. 366. The court, however, will never F make such an order unless it is satisfied that persons having any interest in the property consent, or, if they do not consent, that their interests are amply and fully protected. The persons seeking immediate enjoyment in such a case have no legal right to it, and it is a matter for the court, in each case, to consider whether the order can properly be made.

In the present case, the appellant has no legal right to the order G which he seeks, because, apart from any question of the heir-at-law and next of kin, the annuitants, who have an immediate interest in the residue, are objecting. There being no legal right in the residuary legatees to possession, is this a case where the court ought to make the order? The answer to that question must, in our judgment, be in H the negative. The effect of any such order would be to prejudice, and possibly to defeat altogether, the possible interests of the persons taking under an intestacy. Those persons do not take directly under the will, but, as a result of its provisions and the operation of law, they may

become entitled to the enjoyment of a part of the income of the estate, and there is no means of preventing the possibility of those interests being prejudiced, except by refusing to make the order. In those circumstances, it is, in our judgment, impossible to make any such order as the appellant seeks. It is true that the persons entitled on an intestacy may never become entitled to the enjoyment of any part of the property, but, in our judgment, the court ought never to make such an order if the effect may be to prejudice any interest in any other person, whether present or future, vested or contingent, without the consent of such persons. *Re Deloitte, Griffiths v. Deloitte* (4), on which case the judge relied in the court below, is a good example of this principle. In that case, all the persons presently interested desired to obtain immediate enjoyment of the property, but, although the possibility of any other person who would be entitled to participate ever coming into existence was extremely remote, TOMLIN, J., refused the order. The present case is in some respects a stronger one than that, because the possibility of the heir-at-law and next of kin becoming entitled to receive a part of the income of the estate is by no means very remote. Moreover, there is a further difficulty in the way of the appellant here, which was not present in that case. Here the residue is given to the appellant on charitable trusts, and it has no power to vary those trusts by treating as income that which, by the trust, is to be capital, or *vice versa*. The order sought would have that effect, and that alone is sufficient to disentitle them to the order, unless and until the necessary variation of the trust has been duly sanctioned. For these reasons, in our judgment, the judge came to the right conclusion in this matter.

Appeal dismissed. Form of order varied.

Solicitors : *Shepheards, Walters & Bingley* (for the appellant) ; *Church, Rendell, Bird & Co.*, agents for *Woolcombe, Watts & Scrivener*, Newton Abbott (for the respondent, the testator's widow, and the Newton Abbot Congregational Church) ; *White & Leonard & Nicholls & Co.*, agents for *W. Rackwood Cocks*, Exeter (for the Devon Congregational Union) ; *H. W. Guthrie & Co.* (for the heir-at-law and next of kin).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

MARITIME ELECTRIC CO., LTD. v. GENERAL DAIRIES, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Alness, Lord Maugham), **December 14, 15, 1936, February 8, 1937.**]

Privy Council—Canada—Estoppel—Public utility company—Compulsory statutory charges—Incorrect accounts rendered—Mistake—Public Utilities Act, Revised Statutes of New Brunswick, 1927 (c. 127), ss. 10, 14, 15, 16, 18, 19.

The appellant company, a public utility company, within the meaning of the Public Utilities Act of New Brunswick, sold and delivered electric current to the respondent dairy company, which, to the knowledge of the appellant company, used it in the manufacture of certain milk products. The respondent company paid to the vendors of the cream a price depending, amongst other things, on the cost of manufacture of its products, of which the cost of the electrical energy consumed was a factor. Owing to a mistake on the part of the appellant company's employees the amount of current supplied to the respondent company was wrongly determined on the meter dial readings, and as a result monthly accounts were rendered by the appellant company, and paid by the respondent company for only one-tenth of the current actually supplied. The respondent company, relying upon the correctness of the accounts as rendered, paid to the vendors of the cream used larger sums of money than it would or could have paid for the cream if the proper accounts for electrical energy supplied had been furnished. By the Public Utilities Act, a public utility company is strictly limited as to the charges which it can make, and a public utility company charging or receiving for any service rendered a greater or less compensation than that prescribed by the Act is liable to a penalty:—

HELD: the respondent company could not rely upon an estoppel which would have the effect of defeating the unconditional statutory obligation imposed by the Public Utilities Act. The duty put upon both parties by the statute could not be avoided or defeated by a mistake.

Decision of the Supreme Court of Canada ([1935] S.C.R. 519) *reversed*.
Decision of the Supreme Court of New Brunswick, Appeal Division (8 M.P.R. 67) *restored*.

[EDITORIAL NOTE.] No corporate body can be bound by estoppel to do something beyond its powers, and therefore cannot be bound to do something which is regulated by statute in any other way than the statute requires. The present case would appear to carry this principle to its logical limits, as it is here used to allow a company to re-open an account and enforce its statutory charges when, by the negligence of its own servants, it has rendered an account and been paid only one-tenth of the amount which the statute required it to charge.

AS TO REPRESENTATIONS IN RESPECT OF *Ultra Vires* ACTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 474, 475, para. 542; and FOR CASES, see DIGEST, Vol. 21, pp. 296, 297, Nos. 1059-1068.]

Cases referred to :

- (1) *Carr v. London & North Western Ry. Co.* (1875), L.R. 10 C.P. 307; 21 Digest 288, 1020.
- (2) *R. v. Blenkinsop*, [1892] 1 Q.B. 43; 35 Digest 163, 586.
- (3) *Anctil v. Manufacturers' Life Insurance Co.*, [1899] A.C. 604; 29 Digest 350, 2835.

- (4) *Re A Bankruptcy Notice*, [1924] 2 Ch. 76 ; Digest Supp.
- (5) *Bradshaw v. McMullan*, [1920] 2 I.R. 412 ; 21 Digest 139, case h.
- (6) *Doe d. Chandler v. Ford* (1835), 3 Ad. & El. 649 ; 21 Digest 264, 847.
- (7) *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004 ; 9 Digest 314, 1953.
- (8) *Bloomenthal v. Ford*, [1897] A.C. 156 ; 9 Digest 313, 1949.
- A (9) *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51 ; Digest Supp.
- (10) *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), 56 J.P. 741 ; 35 Digest 35, 280.
- (11) *MacLaine v. Gatty*, [1921] 1 A.C. 376 ; 35 Digest 298, 490.
- (12) *Freeman v. Cooke* (1848), 2 Exch. 654 ; 21 Digest 287, 1019.
- (13) *Deutsche Bank (London Agency) v. Beriro & Co.* (1895), 73 L.T. 669 ; 21 Digest 313, 1154.
- B (14) *Re London Celluloid Co.* (1888), 39 Ch. D. 190 ; 9 Digest 298, 1848.
- (15) *Webb v. Herne Bay Comrs.* (1870), L.R. 5 Q.B. 642 ; 35 Digest 381, 1249.

APPEAL by special leave from a judgment of the Supreme Court of Canada (SIR LYMAN POORE DUFF, C.J., LAMONT, CANNON, DAVIS, and
 C DYSART, JJ.), dated June 28, 1935, reversing a judgment of the Appeal Division of the Supreme Court of New Brunswick (GRIMMER, Acting C.J., BAXTER and LE BLANC, JJ.), dated June 5, 1934, which had affirmed a judgment in the King's Bench Division (RICHARDS, J.), dated Mar. 16, 1934, whereby the appellant recovered from the respondent
 D \$1,931.82 (being the amount claimed) and costs. The facts of the case, which were not in dispute, are set out in the judgment of their Lordships, delivered by LORD MAUGHAM.

Harold L. Murphy, K.C., and *Frank Gahan*, for the appellant company :
 No estoppel can operate to prevent the appellant company from collecting
 E from the respondent company the full amount of the charges for electricity, which the appellant company is authorised, and bound, by the Public Utilities Act, to collect. Since 1875, when *Carr v. London & North Western Ry. Co.* (1) was decided, up to the present time, the four propositions of BRETT, J., in that case have not been challenged. They
 F may be said to constitute the law of estoppel. [Counsel referred to *Greenwood v. Martins Bank, Ltd.* (9).]

Sir Robert Aske, K.C., and *W. L. McNair*, for the respondent company : The agreed facts establish that there was a valid estoppel in this case, and the provisions of the Public Utilities Act do not deprive
 G the respondent company of the right to set up a defence of estoppel. The case falls completely within the principle laid down in *Greenwood v. Martins Bank, Ltd.* (9) and *MacLaine v. Gatty* (11). The provisions of the Public Utilities Act were intended to prevent a public utility company from knowingly giving one customer a preference over another.
 H It was never intended to be used as an instrument for inflicting injury on an innocent customer, or for compelling one to make good to a public utility company losses which it may have sustained by reason of its own mistakes. [Counsel referred to *Sarat Chunder Dey v. Gopal Chunder Lala* (10), *MacLaine v. Gatty* (11), *Freeman v. Cooke* (12), *Greenwood*

v. *Martins Bank, Ltd.* (9), *Deutsche Bank (London Agency) v. Beriro & Co.* (13), *Re London Celluloid Co.* (14), *Webb v. Herne Bay Comrs.* (15).]

LORD MAUGHAM: This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated June 28, 1935, reversing a judgment of the Appeal Division of the Supreme Court of New Brunswick. That court had affirmed a judgment in the King's Bench Division whereby the appellant company had recovered against the respondent company for the sum of \$1,931.82 and costs. A

The appellant company is a private company which sells electrical power in the city of Fredericton, New Brunswick. The company is, however, a "public utility" company within the meaning of the Public Utilities Act of New Brunswick (c. 127 of the Revised Statutes, 1927). It is accordingly under a statutory duty (sect. 10) to furnish reasonably adequate service and facilities. It has annually to make to the board of commissioners of public utilities, established by the Act, some elaborate returns. It is strictly limited as to the rates, tolls, and charges which it can make and exact, which must be in exact accordance with filed schedules, open to public inspection, and these schedules must remain unchanged until altered, reduced, or modified as provided by the Act (sects. 14 and 15). Sect. 16 is in the following terms: B C D

No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established, or demand, collect, or receive any rates, tolls, or charges not specified in such schedules. E

By sect. 18, it is provided that any public utility company charging or receiving for any service rendered a greater or less compensation than that prescribed as provided by the Act is guilty of "unjust discrimination," which is thereby prohibited, and is made liable to a penalty. By sect. 19, no person, firm, or corporation: F

shall knowingly solicit, accept, or receive any rebate, concession, or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules in force, as provided herein, or whereby any service or advantage is received other than is herein specified.

A penalty is provided for the violation of this section. The respondent company during the material times carried on a dairy business in the city of Fredericton, and manufactured and sold butter, ice-cream, and other milk products. It bought electric energy from the appellant company. The amount of \$1,931 claimed by the latter is the amount remaining due for electric energy supplied from the month of Dec., 1929, to the month of Mar., 1932, according to the schedules in force during that period. Only \$546.28, instead of \$2,478.10, had been paid. The defence of the respondent company is simply that of an estoppel raised on agreed facts of a somewhat singular nature. No *viva voce* G H

evidence was given at the trial. It is important to keep closely to the principal facts, as agreed, and their Lordships doubt whether it is legitimate or safe to draw any further inference of fact in the existing circumstances. It will be convenient to state the important facts, as **A** agreed, in a series of paragraphs.

1. The respondent company carried on business in the city, in buying cream from farmers and others, and using the same in the manufacture of butter, ice-cream, and other milk products.

B 2. It paid to the farmers, and others, from whom the cream was bought, a price depending, amongst other things, on the cost of manufacture of the butter, ice-cream, and other milk products.

C 3. The respondent company used the electric energy supplied by the appellant company for power, and other purposes in connexion with its manufacture of butter, ice-cream, and other milk products, and the cost of such energy entered into the cost of such manufacture, and directly affected the price which the respondent company paid to the farmers and others for the cream.

D 4. The appellant company at all material times knew that the respondent company was using the electric energy in its manufacture, and it rendered to the latter each month a statement, purporting to show the amount of electric energy supplied to the latter, purporting to be based on the reading of the meter placed by the appellant company on the respondent company's premises, for the purpose of registering the energy so supplied.

E 5. The respondent company believed the statements so rendered to be true, and in accordance with the reading of the meter, and it from time to time paid to the appellant company the amounts shown by such statements.

F 6. The respondent company used the amounts so paid as part of its cost of manufacture of butter, ice-cream, and other milk products, in determining the cost of manufacture, for the purpose of fixing the price so to be paid for the said cream, and the respondent company did base thereon the amount which it paid to the farmers and others for the said cream.

G 7. The mistake in rendering the said statements showing incorrect amounts to be due was the mistake of the appellant company.

8. The respondent company acted upon the said statements so rendered, believing the same to be true.

H 9. By reason of such belief, the respondent company paid to the farmers and others large sums of money, more than it would or could have paid for the said cream if the amounts now claimed for electric energy had been rendered to and claimed from the respondent company at the several times when the said statements were rendered by the appellant company.

These remarkable facts, involving, as they do, the long-continued undercharging of the appellant company to so serious an extent, were to some extent explained by the following admitted circumstance. The meter was accurate, and conformed with the statutory requirements; but, in order to arrive at the correct amount of electric energy, it was necessary to multiply the dial-reading by ten. Through error, this was not done, and, as a result, the respondent company was charged with only one-tenth of the electric energy supplied to it. Thus, the first statement rendered, that of Dec. 18, 1929, showed 106 k.w.h. This was a correct reading of the dial, but, to obtain the actual amount of energy used, the reading should have been multiplied by ten, making 1,060 k.w.h. For this, the correct charge, according to the schedules, would be \$44.50, instead of the minimum fee of \$15. The same error was made in compiling every one of the statements up to Mar. 16, 1932.

To the plea of estoppel, two objections were raised by the appellant company. First, it was contended that, apart from any other reason, estoppel was barred or precluded by the provisions of the Public Utilities Act. It was contended (citing *HALSBURY*, Hailsham Edn., Vol. 13, p. 474, para. 542):

A party cannot by representation, any more than by any other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating.

Secondly, it was contended that (apart from the statute) there could be no estoppel, since the representations contained in the monthly statements were not intended to induce on the part of the respondent company any course of conduct other than the payment of the amounts stated to be due. On this point, great reliance was placed by the appellant company on the well known and often-cited propositions relating to estoppel in pais laid down in 1875 by *BRETT, J.* (afterwards *LORD ESHER, M.R.*) in the case of *Carr v. London and North Western Ry. Co.* (1), at p. 316. It was urged that the representation relied on as founding the estoppel must be one intended or calculated to bring about the particular course of conduct which was the cause of detriment to the party relying on the estoppel. Either of these contentions, if sound, would suffice to defeat the estoppel, and to entitle the appellant company to judgment. *RICHARDS, J.*, in a careful judgment in the King's Bench Division of the Supreme Court of New Brunswick, decided both points in favour of the appellant company, and gave judgment for \$1,931.82 and costs. In the Appellate Division, this judgment was confirmed by *BAXTER, J.*, and *GRIMMER, Acting C.J.*, on the second of the two grounds above stated, *LE BLANC, J.*, intimating a doubt as to whether the result might not have been different if negligence on the part of the present appellant company (which had not been pleaded) had been alleged. When the matter came on appeal before the Supreme

Court of Canada, another view was taken, and DYSART, J., delivered the judgment of the court (concurring in by DUFF, C.J., and LAMONT, CANNON, and DAVIS, JJ.), deciding both the contentions in favour of the present respondent company, and therefore accepting the plea of **A** estoppel, with the result that the appeal was allowed, and the judgment reversed and set aside with costs in all the courts. In the view of their Lordships, assisted by able and exhaustive arguments by counsel on both sides, the two points are of considerable difficulty and importance. It will be convenient to deal, in the first place, with the contention **B** based on the statute.

The problem cannot be more admirably stated than by DYSART, J. He said :

C Applied to the present case, the Act imposes a duty on the electric company to charge, and on the dairy company to pay, at scheduled rates, for all the electric current supplied by the one and used by the other, during the 29 months in question. The specific question for determination here is, can the duty so cast by statute upon both parties to this action be defeated or avoided by a mere mistake in the computation of accounts ?

In the view of their Lordships, the answer to this question, in the case of such a statute as is now under consideration, must be in the negative. **D** The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy, in a general sense. In such a case—and their Lordships do not propose to express any opinion as to statutes which are not within this category—where, as here, the statute imposes a duty **E** of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which, in certain special circumstances can be invoked **F** by a party to an action ; it cannot, therefore, avail, in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. **G** To hold, as the Supreme Court has done, that in such a case, estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships, with respect, to approach the problem from the wrong direction ; the court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the **H** admission of an estoppel would nullify the statutory provision. A similar conclusion will be reached if the question put by the learned judge is looked at from a somewhat different angle. It cannot be doubted that, if the appellant company, with every possible formality, had purported to release its right to sue for the sums remaining due according to

the schedules, such a release would be null and void. A contract to do a thing which cannot be done without a violation of the law is clearly void. It may be asked, with force, why, if a voluntary release will not put an end to the obligation of the respondent company, an inadvertent mistake by the appellant company, acted upon by the respondent A company, can have the result of absolving the appellant company from its duty of collecting and receiving payment in accordance with the law. To collect the money due will, in one sense, cause loss or injury to the respondent company, to the extent of \$1,931.82. Their Lordships do not know, because the admission (No. 9 above) does not cover the point B whether to allow the estoppel will not leave the respondent company with an advantage, consisting of the difference between the sum of \$1,931.82 and the total amount by which the respondent company was led to increase its payments of cream to farmers and others. It is, however, clear that to disallow the estoppel will leave the respondent company C out of pocket, to the extent of the increased amounts just referred to. It is an unfortunate result; but the obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence. In the present case, it may be observed that the injury is not a cause of action. Their Lordships are unable to see how the court D can admit an estoppel which would have the effect *pro tanto* and in the particular case of repealing the statute.

If we now turn to the authorities, it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case E in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The text-books have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from con- F tending that a particular act was *ultra vires*. Their Lordships propose to deal briefly with the more relevant authorities. In *R. v. Blenkinsop* (2), a municipal body, under a mistake of law, had sent demands to a railway company for only one-third of the sums legally due. The error continued for four successive years. In the fifth year, the overseers took steps to recover the amounts unpaid. The company set up an G estoppel based on the contention that the company had acted on the statements sent to it, and had paid out the money in dividends; but the estoppel was disallowed. In the case of *Ancil v. Manufacturers' Life Insurance Co.* (3), a question arose in reference to a condition in a policy of life assurance which provided for the policy becoming in- H contestable on any ground if the same should have been in force for a year, the premiums having been promptly paid. The policy was attacked on the ground of a lack of insurable interest, within the meaning of the Civil Code of Lower Canada. The condition was relied on, and estoppel

was pleaded, but was not allowed. LORD WATSON, in delivering the judgment of the Privy Council, observed on this point, concurring in the opinion expressed by the majorities of the Supreme Court of the Superior Court sitting in review (p. 609):

A The rule of the Code appears to them [their Lordships] to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties.

More recently, in *Re A Bankruptcy Notice* (4), a similar point arose in reference to the Deeds of Arrangement Act, 1914. The main question was

B whether a party could be estopped, by a letter of assent acted upon by the recipient, from contending that a certain agreement was void for want of registration. Various points were involved, but it is to be noted that LORD ATKIN (then ATKIN, L.J.), at p. 97, remarked:

C Whatever the principle may be [referring to a contention as regards approbation and reprobation], it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

A statement made by LORD SHAW OF DUNFERMLINE, in a case of
D *Bradshaw v. McMullan* (5), at p. 425, supports the same view. It should be added that, as regards estoppel by deed, it was long ago held that, if the deed were executed in contravention of a statute, there could be no estoppel. The leading case is *Doe d. Chandler v. Ford* (6).

The Supreme Court appear to have attached great, if not decisive,
E weight to the decisions of English courts in relation to the Companies Acts, and, in particular, in relation to the effect of the Companies Act, 1867, s. 25. That unfortunate section led to much injustice, and was finally repealed in 1900; but it was not so worded as to cause the disastrous results which would have followed from a decision that the
F section precluded a purchaser in the market of shares purporting to be fully paid by certificates under the seal of the company from relying on the certificates. The leading case was that of *Burkinshaw v. Nicolls* (7), and LORD CAIRNS, L.C., in making the leading speech, was careful to point out that the purchaser of the shares was not violating the terms of the statute. At p. 1017, LORD CAIRNS, L.C., observed as follows:
G

He comes before the court not in any way affecting to break in upon the enactment which I have read. He says, "I bow to the words of the enactment. I have not in any way attempted to interfere with it, but I have taken, in the course of business, a share, in regard to which I have the representation of the company that that section has been complied with."

H LORD CAIRNS went on to point out that the whole of the dealings with shares in public companies would be paralysed if, a share being dealt with in the ordinary course of business in the market with a representation upon the certificate by the company that the whole amount of the share had been paid, the purchaser was bound to disregard the assertion

of the company, and must embark on what might be a most difficult investigation as to the mode in which the section had been complied with. It is therefore plain that the House of Lords decided the case on the view that the estoppel in question was not an attempt in any way to break in upon the terms of the enactment. In the later cases, such as *Bloomenthal v. Ford* (8), the contrary was not even suggested. In comparing the facts of the present case and those which existed in *Burkinshaw v. Nicolls* (7), it may be desirable to note that, in the present case, as above pointed out, the appellant company is acting in direct violation of the statute if it does not collect and receive from the respondent company the amount remaining due, whilst in the latter case a duty was not imposed on the company, under sect. 25, to recover in cash from the shareholder the full amounts of the shares in cash. It must be remembered that the amounts paid up on shares generally depend on calls duly made, and that shares are constantly transferred from one shareholder to another. In these circumstances, sect. 25 makes no attempt to affix a duty upon the company to exact payment from specific shareholders. In truth, the position of a shareholder is very widely different from that of a purchaser of electric energy who is bound by such a statute as the Public Utilities Act of New Brunswick.

Their Lordships having thus arrived at the conclusion that estoppel is not open to the respondent company, for these reasons, which are in effect the same reasons as those given by RICHARDS, J., in the King's Bench Division, on this part of the case, it becomes unnecessary for them to express an opinion as to the other ground on which the appellant company has challenged the estoppel. As above pointed out, the agreed facts are of a very unusual character, and the diligence of counsel was unable to find any authority in which the invalidity of an estoppel was held to turn on the circumstance that the course of conduct induced by the representation was not that intended to be caused by the person making the representation. The question must, to a great extent, turn on a consideration of the numerous authorities referred to in the Canadian courts. On the whole, it seems to their Lordships that the wiser course will be to leave this part of the case undecided, so far as they are concerned, and they propose to express no opinion on it.

For the reasons above given, their Lordships are of opinion that the appeal succeeds, and that the judgment of the Appeal Division of the Supreme Court of New Brunswick, and that of RICHARDS, J., ought to be restored, with costs here and below. Their Lordships will humbly so advise His Majesty.

Appeal allowed with costs.

Solicitors: *Charles Russell & Co.* (for the appellant company); *Edward D. K. Busby* (for the respondent company).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

KAHN v. AIRCRAFT INDUSTRIES CORPORATION, LTD.

[KING'S BENCH DIVISION (Singleton, J.), **January 21, 22, 25, 26, 27, 28, 29, February 5, 1937.**]

Agency—Commission—Agent prevented from earning—Wilful default of principal—Damages—Assessment.

An agent procured an agreement for the sale of shares for the sum of £200,000 upon which he was entitled to £16,000 commission. The condition of his agreement with the defendant company was: "in the event of our making the purchase." The negotiations were continued up to the day for completion, when the purchase was not completed by reason of the purchasers requiring certain further arrangements that the vendor was held entitled to refuse to consider. It was also held that the agreement for sale was a completed agreement and one which the defendant company by its wilful default failed to complete:—

HELD: (i) there was an implied term in the agreement with the agent that the purchasers would not by their wilful default prevent him from earning the commission.

(ii) the measure of damages was the full amount of the commission as the agreement to purchase was complete in every respect and was not the subject of any further negotiation or inquiry into title.

Trollope (George) & Sons v. Caplan ([1936] 2 All E.R. 842) *applied*.

[EDITORIAL NOTE.] The present case considers carefully the position of an agent where, after he has done all he contracted to do to secure a contract for his principal, the latter for his own reasons refuses to go on with the matter. The judgment carefully considers the decision in *Trollope (George) & Sons v. Caplan* (8), and the earlier cases and applies the law there laid down to the case where the court is convinced and holds as a fact that the parties had come to a complete agreement. The agent in the present case cannot succeed in a claim for commission since that was only payable "in the event of our making the purchase," and the purchase was not in fact completed. The plaintiff's remedy was therefore for damages for being prevented from earning his commission, and the question of quantum is decided upon the principles laid down by the Court of Appeal in the above case.

AS TO PREVENTING AGENT EARNING REMUNERATION, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 261, 262, para. 435; and FOR CASES, see DIGEST, Vol. 1, pp. 509-512, Nos. 1754-1769.]

Cases referred to:

- (1) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; Digest Supp.
- (2) *Inchbald v. Western Neilgherry Coffee, Tea & Cinchona Plantation Co., Ltd.* (1864), 17 C.B. N.S. 733; 1 Digest 542, 1952.
- (3) *Fisher v. Drewett* (1878), 48 L.J. Q.B. 32; 1 Digest 510, 1759.
- (4) *Lott v. Outhwaite* (1893), 10 T.L.R. 76; 1 Digest 514, 1775.
- (5) *French (L.) & Co. v. Leeston Shipping Co.*, [1922] 1 A.C. 451; 41 Digest 351, 2006.
- (6) *White v. Turnbull, Martin & Co.* (1898), 78 L.T. 726; 41 Digest 351, 2005.
- (7) *Howard Houlder & Partners, Ltd. v. Manx Isles S.S. Co.*, [1923] 1 K.B. 110; 41 Digest 350, 2001.
- (8) *Trollope (George) & Sons v. Caplan*, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.

ACTION for commission earned by securing an agreement for the purchase of shares.

The plaintiff in July, 1936, approached the defendant company and inquired whether it would be interested in purchasing practically all the shares in Alley & MacLellan, Ltd., a limited company associated with Beardmore & Co., Ltd. The defendant company is an issuing house and the managing director, thinking an advantageous purchase of such shares would lead to successful public issue, entered into an agreement with the plaintiff in the terms of the following letter, dated July 14, 1936 :

Alley & MacLellan, Ltd.

DEAR SIR,—With reference to the above business, in the event of our making the purchase of the whole of the ordinary and preference shares of the company now issued, we agree to cover you to the extent of £16,000. For and on behalf of Aircraft Industries Corpn., Ltd., W. A. Phillips, Managing Director.

The negotiations on the part of the vendors were mainly in the hands of a Mr. Reincke, then the chairman of the directors of Beardmore & Co., Ltd., and also the chairman of Alley & MacLellan, Ltd. The shares to be purchased were held by Beardmore & Co., Ltd. On the part of the defendant company his Lordship found as a fact that Mr. Phillips, the managing director of that company, had full power and authority to conclude a binding agreement on the matter. His Lordship also held on the facts that there was a concluded agreement between the parties. This agreement was complete in all its terms but went off in the following circumstances. The defendant company was anxious that Mr. Reincke should remain chairman of the company, and he had intimated that he would do so if he approved the prospectus which would necessarily be issued. On Aug. 5, 1936, when it was thought completion would take place, Mr. Reincke was asked whether he would approve the following matters being included in the prospectus : (a) the capital of the company to be increased by £100,000 or £150,000 ; (b) the plaintiff's commission to be included in the purchase price and paid by the vendors ; (c) the unissued shares of the company to be issued at par to the defendant company. The par value of the shares was £1, and the present sale was upon a valuation at 47s. per share. Mr. Reincke protested that these matters in no way concerned the present sale, and that he could in no way approve them.

The material claim of the plaintiff was for damages equal in amount to his commission upon the footing that the defendant company had prevented him from earning that sum as commission, and the case is only reported on this point.

J. Millard Tucker, K.C., Valentine Holmes and T. G. Roche for the plaintiff.

Gilbert Beyfus, K.C., and P. A. Devlin for the defendant company.

SINGLETON, J. : I now come to more difficult questions. It was argued, by Mr. Beyfus, that there was no employment of the plaintiff, and that it was open to the defendant company at any time to call off

that deal, so far as the plaintiff was concerned, and decline to pay him any commission. I have already said that I accept the plaintiff's evidence in general, and, in my judgment, he was employed in this sense, that he was to negotiate an agreement on behalf of the company with Beardmores, if possible. He put information before the defendant company, and he was instructed by it to get more information, and to negotiate. With the approval of Mr. Phillips, he and Mr. Kenney [the defendants' accountant] saw Mr. Reincke. He brought about an introduction to Mr. Reincke. With the approval of Mr. Phillips, he and Mr. Kenney went to Glasgow, and saw other directors of Beardmores, and negotiated on behalf of the defendant company. At the desire of Mr. Phillips, he later made an offer, as instructed, and he brought about an agreement, taking part in the negotiations at the solicitors' office. He was, indeed, present at the meeting of July 30, which was attended by Mr. Phillips, and at which final agreement was reached. Having regard to all the circumstances, and, in particular, to the report of Mr. Kenney, which Mr. Phillips saw at the meeting of July 30, I think it is idle to suggest that the plaintiff was not employed in the sense I have suggested. He did that which he set out to do. As instructed by the managing director of the defendant company, he brought about agreement between the two parties, Beardmores and the defendant company, on terms which were acceptable to both, and, but for the action of the defendant company or that of its managing director, the purchase of the shares would have been completed.

Mr. Beyfus puts a further question: Did the defendant company act arbitrarily or without just cause in terminating the negotiations? He speaks of them as negotiations, but really the question should end, "in refusing to complete the agreement into which it had entered." I think it did. The agreement had been entered into by the managing director on behalf of the defendant company, and he refused to complete it because Mr. Reincke would not agree to additional terms, which were no part of the agreement, or of the negotiations which preceded the agreement, and which ought not to have been raised. I am satisfied that the raising of them was wholly improper, and, further, that there was wilful default on the part of the defendant company's managing director.

I have dealt with the question of increase of capital and proposed option to the purchasers, and I should add that I see no reason why Mr. Reincke should have been asked to include the commission payable to the plaintiff in the purchase-price, and thus make it £216,000, as though Beardmores had employed the plaintiff as their agent. The request was that the consideration should be wrongly stated for the purposes of the issuing house.

Mr. Tucker, on behalf of the plaintiff, claims the sum of £16,000 as commission due, on the ground that the plaintiff has completed his work,

and is entitled to be paid. Having regard to the terms of the agreement, I do not think the plaintiff can recover the amount of his commission. Alternatively, Mr. Tucker claims damages, which he contends should be the total amount of the commission. It is said that, if the plaintiff is not entitled to be paid his commission, he is prevented from being in that position only by the breach, on the part of the defendant company, of an implied condition that it would not do anything to prevent him earning his commission. In a case of this nature, I think the plaintiff ought to be bound by the strict terms of his bargain. The agent takes his risk, and, if he does not bring about a purchase or agreement, he is not entitled to his commission ; but, if he does bring about agreement, is his claim to commission defeated if the one who has employed him to negotiate refuses to complete, or is there an implied term of the agreement between the company and him that the principal will not do anything which will prevent the agent from earning his commission ? A
C
It is clear that such a term can be implied only if it is necessary to give the contract business efficacy. In the present case, the plaintiff brought about complete agreement. The defendant company, which instructed him, and for which he was acting, then endeavoured to introduce new conditions, and conditions which ought not to have been put forward, D
and, when the other party to the contract would not agree to them, the defendant company, through its managing director, sought a way of getting out of the contract, and declined to complete.

There are really two questions : (i) was there an implied term that the defendant company would not, by its wilful default, prevent the plaintiff from earning his commission and, if so, (ii) has the defendant company committed a breach of that term, and thus given the plaintiff a right to damages ? E

In the case of *Trollope (George) & Sons v. Martyn Bros.* (1), a somewhat similar case was considered by the Court of Appeal. It was decided by the majority that, in the ordinary estate agent's case, there should be implied a term that, if the purchaser introduced by the plaintiff was ready and able to complete the contract, the defendants would not, by refusing to complete, prevent the plaintiff from earning commission. That was an appeal from a decision of HORRIDGE, J., and the judgment of the Court of Appeal was a majority judgment, a judgment of GREER and MAUGHAM, L.JJ., SCRUTTON, L.J., dissenting. GREER, L.J., at p. 447, having referred to the alternative claim which the plaintiffs put forward, said : F
G

It is undoubtedly the law that as between vendor and purchaser, the matter must be deemed to remain in negotiation until a form of contract is settled, and contracts are exchanged. But it does not follow from this that the plaintiffs would necessarily be without remedy if the purchaser they introduced was ready and willing to sign the contract in the form in which he was asked by the vendor to sign it, and the vendor thereafter withdrew from the negotiations. In my judgment the defendant's letter of Apr. 24 involves an implied undertaking that if the H

purchaser introduced by the plaintiffs was ready to complete the contract on the terms put forward by the vendor, they would not by refusing to complete prevent the event from happening which would entitle the plaintiffs to their commission. I think the two letters must be construed in the light of the numerous decisions as to what, in the absence of agreement to the contrary, are the rights of a commission agent who has been employed to introduce a purchaser. The rights of a commission agent employed to find a purchaser where there is no stipulation "subject to contract" have been frequently considered by the courts.

Then GREER, L.J., deals with a number of authorities, and he refers to the words of WILLES, J., in *Inchbald v. Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd.* (2), and adds at p. 448 :

This observation is, perhaps, too widely stated, but in so far as it states an obligation not to do any act which prevents the person entitled to receive the money from receiving it, it accords with the law as laid down in other cases—such, for example, as *Fisher v. Drewett* (3).

Then, at p. 450, GREER, L.J., added :

It is to be observed that the contract between the plaintiffs and the defendants made by the letters of Apr. 21 and Apr. 24, related to commission in the event of the completion of a sale of the property "subject to contract." It is quite true that commission in terms would not become due until the satisfactory completion of the sale, but I think the agreement means that if the purchaser from whom the plaintiffs had obtained the offer for the property subject to contract was prepared to sign a contract in the terms required by the owners, they would do nothing to prevent the satisfactory completion of the transaction so as to deprive the plaintiffs of the commission which they had agreed to pay. The learned judge in the court below has based his finding on a breach of the implied term of the contract which prevented the plaintiffs from earning their commission, and has assessed the damages at the amount of the commission that would have become payable if contracts had been signed and exchanged, and the sale completed by conveyance.

Then he continued at pp. 450 and 451 :

The view I take of the present case may be shortly stated as follows. The service for which the defendants engaged Messrs. Trollope & Sons was, that they would introduce as a purchaser of the property in question their customer Major Howard who would be prepared to buy on the terms of contract prepared by the defendants' solicitors and approved by Major Howard's solicitors. When the latter assented to the terms of contract sent by the vendors' solicitors, and on behalf of the buyer indicated the latter's acceptance of those terms, the plaintiffs had completed the work they had undertaken to do, though the vendor might still have been free to refuse to sign the contract, without any liability on his part to the proposed purchaser. But as between the plaintiffs and the defendants, the latter could not, after the plaintiffs' work was complete, deprive them of the fruits of their work by withdrawing their consent to the signing of the contract and the completion of the sale.

Later in his judgment, GREER, L.J., said at p. 452 :

In my judgment, having regard to the terms of the contract between the plaintiffs and the defendants in this case, there was an implied undertaking by the defendants that they would not after the plaintiffs' work was completed deprive them of the fruits of their labour by refusing to sign the contract tendered to the plaintiffs' buyer by the defendants' solicitors with their authority, or by refusing without just cause to complete the transaction on the terms to which they had asked the plaintiffs' customer to consent. I think such a term may be implied in the contract contained in the two letters to which I have called attention.

MAUGHAM, L.J., at p. 456, said :

By "default" I mean a refusal without any reasonable ground to proceed with the matter. The question then remains whether there was not an implied term in the circumstances that the defendants would not prevent the plaintiffs from earning their commission. In my opinion where a person is employed to do work on behalf of another, payment to be made on completion of the work, there is a necessary

implication that the employer will not do anything to prevent the earning of the remuneration, unless at any rate he has some just excuse for his interference with the course of events obviously contemplated by both parties when they entered into the contract of employment.

At p. 461, MAUGHAM, L.J., referred to the decision in the case of *Lott v. Outhwaite* (4), and said :

That case came before the Court of Appeal, and LINDLEY, L.J., observed that in order to entitle the agent to his commission he must prove either that the purchase had been completed, for that was necessary under the terms of the agreement between plaintiff and defendant, or that, if it had not, the non-completion was due to the default of the vendor. I regard this as a clear statement that if the only reason why the commission was not earned was the default of the defendant the latter would be liable in damages.

Then, almost at the end of his judgment, MAUGHAM, L.J., said at p. 462 :

In taking the view I have as to the implied term contained in the contract between the plaintiffs and the defendants I quite agree that the implication can only properly be made if the term is a necessary one, and that it is not enough to say that it is reasonable.

SCRUTTON, L.J., who dissented from the other members of the court, said this at pp. 444 and 445 :

There is no necessary implication of a term which the parties have not expressed, a term that an agent who procures a purchaser "subject to contract" is entitled to a commission though the employer only does what he has a right to do, that is, refuses to agree and exchange a formal contract. Agreeing with a great deal of this judgment, MAUGHAM, L.J., takes the view, as I understand his judgment, that although the implied term that the employer must not "prevent" the agent from earning his commission is too wide, it is "necessary" to imply a term that the employer shall not "without just cause" prevent the agent from earning his commission, and as a corollary that if he "arbitrarily" (by which phrase I understand him to mean "without alleging any just excuse") refuses to sell, he is in default, though in an agreement subject to contract he breaks no contract with the purchaser by refusing to complete without giving any reason. I cannot agree with this view, which seems to make the subsidiary matter the remuneration of the agent who is to obtain a contract of sale, as of more importance than the sale itself, which without breach of any contract with the purchaser has not been completed or materialised. It does not seem to me that a vendor taking an attitude towards the purchaser which by his contract he is entitled to adopt, if he gives no reason why he so acts except that it is in the bond, is acting arbitrarily and therefore in some unspecified default. Every man who receives and refuses without giving a reason an offer which he is not bound to accept, may be said to act arbitrarily, but I cannot understand why he is in default.

Now, in the case before me, the plaintiff was agent for the proposed purchasers, but, if there must be implied a term by the vendors in the case of *Trollope (George) & Sons v. Martyn Bros.* (1), equally, I think, there ought to be on the part of the purchasers in the present case, and a careful reading of the dissenting judgment of SCRUTTON, L.J., would appear to show that he would have agreed with the judgment of GREER, L.J., and that of MAUGHAM, L.J., if there had been a complete agreement between the respective vendors and purchasers as to the contract. In this case before me, there was no provision "subject to contract." The vendors were entitled to withdraw in that case; they had not agreed on a contract. In the present case, they

had so agreed, and, but for the conduct of the defendant company, the agreement would have gone through, and the purchase would have been completed. It seems to me that I am bound by the decision of the Court of Appeal to hold that there was an implied term, as between
 A the plaintiff and the defendant company, that, if agreement was reached between the plaintiff and the defendant company, the defendant company would not, by its refusal to complete on the terms agreed, deprive the plaintiff of his right to commission. Mr. Beyfus cited to me the speech of LORD DUNEDIN, in the case of *French (L.) & Co. v. Leeston Shipping*
 B *Co.* (5), at p. 455, where LORD DUNEDIN, in dealing with a claim for commission on freight earned under a charterparty which had failed because of the sale of the ship, said :

I would only like to add one observation as to the reservation which was made in *White's* case (6), and which seems to have rather troubled BANKES, L.J., in this case, as to wilful default. I think that wilful default would only arise if it could be shown that the act which had been done, and which should have had as its sequel the non-earning of further commission, had been done by the doer of it, not *prima facie* for a purpose of his own, but simply and solely to avoid payment of the commission.
 C

This passage has given me considerable trouble. It does not appear to have been cited in the case of *Trollope (George) & Sons v. Martyn Bros.* (1) in the Court of Appeal, nor in a later *George Trollope & Sons* case (8) to which I shall refer ; but the case of *Howard-Houlder & Partners, Ltd. v. Manx Isles S.S. Co.* (7), was referred to in the judgment of SCRUTTON, L.J., in the first *George Trollope* case (1), at p. 441, and it is
 D to be noticed that McCARDIE, J., in *Houlder's* case (7), at p. 113, said :
 E

In view of the dictum of LORD DUNEDIN in *French (L.) & Co. v. Leeston Shipping Co.* (5), I may add that there is here no evidence and no suggestion that the defendants sold the vessel to the charterers in order to escape the payment of commission to the plaintiffs in respect of the charter hire. That dictum of LORD DUNEDIN may call for consideration in some other case. I express no opinion upon it.

I cannot think that the words of LORD DUNEDIN were meant to cover a case such as this, or that they escaped the notice of SCRUTTON, L.J., who had clearly read the judgment of McCARDIE, J., or that they escaped the notice of the other two members of the court in the *George Trollope* case (1). Further, it appears to me that, if they cover this case, equally
 G they would have covered both the *George Trollope* cases (1) and (8), and would have resulted, if applied, in judgment for the defendant in each of those cases.

For the reasons I have given, I have come to the conclusion that the plaintiff is entitled to damages, and it now remains for me to consider
 H what the amount of those damages should be. This question was considered in the case of *George Trollope & Sons v. Caplan* (6), a case in which it was held :

that before an award of damages could be made equal to the commission the plaintiffs would have earned had the transaction gone through, it must be found

as a fact that but for the action of the defendant a binding contract with the purchaser would have been entered into; that on the facts of this case this could not be said inasmuch as, except as to the price, none of the terms had been agreed; and therefore that there must be a new trial to ascertain what damage the plaintiffs had actually suffered by being deprived of the chance of earning their commission.

That was an appeal from the decision of the learned county court judge. A
GREENE, L.J., at p. 399, said :

It is not the circumstances that the agents have done everything they could to earn their commission coupled with a withdrawal by the principal without reasonable cause that justifies an award of damages equal to the commission. Before such an award can properly be made it must in my opinion be found as a fact that but for the action of the principal a binding contract would have been made which is quite a different thing. It does not in the least follow from the fact that the agent has done everything he can do that a binding contract will be made. Nor does it follow from the fact that the withdrawal of the vendor at that stage was an arbitrary one that but for such withdrawal a binding contract would have been made. It is, in my judgment, a question of fact in each case whether or not the contract would have been made if it had not been for the vendor's action, and to this question the learned county court judge does not appear to have directed his mind; or at least if he did direct his mind to it it was on the hypothesis (which I have already shown was incorrect) that all the terms of the proposed contract had been agreed. B C

GREENE, L.J., later said at p. 401 :

If all the plaintiffs in the present case could show was that the defendant had wrongfully deprived them of the chance of earning their commission as distinct from preventing them from earning commission which, but for the defendant's action, they would have earned, some damages could, I think, be awarded, since it appears to me on the authorities that the implied undertaking in contracts of this nature covers the case where the principal without just excuse does something which deprives the agents of the chance of earning the commission, at any rate where the agents have rendered services under their contract with the principal. But the measure of damages to be awarded in such a case must depend on the value of the chance of earning the commission, and that value may be great or small or nominal according to the circumstances. In conclusion I may perhaps be allowed to say that in my judgment the authorities as to the rights and obligations of house agents and their clients with regard to such questions as the present one are not in a very satisfactory condition, and to express the hope that one day the whole position may be reviewed by the House of Lords. D E

It may be that, as a result of this case, the position will be reviewed by the House of Lords, because there is a considerable sum of money in F
dispute.

I have sought, in view of the importance of the case, to set out my findings of fact fully, and, on this last question for my consideration, I have sought to follow that which the Court of Appeal said I ought to follow, and that is, to look at the circumstances which are relevant. I G
am not entitled to cut down the amount of damages because it seems to me to be a large sum, or for any arbitrary reason of my own. I must look at the circumstances as a whole. Whether the managing director had authority to enter into this contract on behalf of the defendant company does not make a great deal of difference. I think he had H
authority, and that he agreed, but, if he had not authority, his action in entering into the agreement would have been approved by the board if he had put the matter before them properly. Instead, he acted arbitrarily, and without just cause, and, as I think, improperly. But

for that, the plaintiff would have become entitled to the £16,000 commission, and, applying the tests which have been laid down as the tests I ought to apply, I think the plaintiff is entitled to the full sum of damages, £16,000.

A *Judgment for plaintiff for £16,000, with costs.*

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiff) ; *Clifford-Turner & Co.* (for the defendant company).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

B

GREENWOOD TILERIES, LTD. v. CLAPSON.

[KING'S BENCH DIVISION (BRANSON, J.), **February 3, 4, 5, 8, 10, 1937.**]

Waters—River bank—Erected and maintained under statute—Wall substituted by private owner—Liability for maintenance of wall.

C

A river bank made by commissioners appointed under a private statute was given into the care of elected surveyors whose duty it was to keep and repair the bank. A private landowner built a wall through the bank in such a way as to make the wall replace part of the bank as a protection against floods. On the occasion of a particularly high tide, though not the highest on record, the waters broke through the wall, but not the bank alongside, and flooded neighbouring land :—

D

HELD : (i) as the surveyors had no right to prevent the private landowner cutting through the bank, they were under no duty to maintain the substituted defence, and the action failed against them:

(ii) the owner of the wall owed a duty to the neighbouring landowners to keep the wall in good repair.

E

(iii) as the bank had withstood the tide which broke through the wall, and in any event the tide was not the highest on record, the owner of the wall could not rely upon the defence of act of God.

[EDITORIAL NOTE.] The question here is whether the persons charged with the repair of the bank were liable to repair a wall which had replaced part of the bank. It is held that as they had no power to prevent anyone cutting into the bank and could not have sued for an injunction to prevent him from so doing, they could be under no liability to repair any substituted defence put in its place. It seems clear that the persons who cut into the bank must be liable if any damage ensues from the breach.

F

AS TO SEA WALLS AND DEFENCES, see HALSBURY, 1st Edn., Vol. 28, Waters and Watercourses, pp. 382-384, paras. 717-720 ; and FOR CASES, see DIGEST, Vol. 44, pp. 79-83, Nos. 606-644.]

G

Cases referred to :

(1) *Hudson v. Tabor* (1877), 2 Q.B.D. 290 ; 44 Digest 82, 640.

(2) *Newcastle (Duke) v. Clark* (1818), 8 Taunt. 602 ; 41 Digest 55, 407.

(3) *Behrens v. Richards*, [1905] 2 Ch. 614 ; 44 Digest 77, 584.

H

(4) *Cowley v. Newmarket Local Board*, [1892] A.C. 345 ; 26 Digest 400, 1251.

(5) *Glossop v. Heston & Isleworth Local Board* (1879), 12 Ch. D. 102 ; 44 Digest 51, 365.

(6) *Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co.*, [1931] 2 K.B. 334 ; Digest Supp.

(7) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 ; 36 Digest 187, 311.

- (8) *R. v. Essex Sewers Comrs.* (1885), 14 Q.B.D. 561; *affd. Fobbing Sewers Comrs. v. R.* (1886), 11 App. Cas. 449; 41 Digest 53, 386.
- (9) *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katherine's Docks Co.* (1878), 9 Ch. D. 503; 44 Digest 63, 449.
- (10) *Nichols v. Marstrand* (1876), 2 Ex. D. 1; 36 Digest 197, 376.
- (11) *Lyme Regis Corp'n. v. Henley* (1834), 1 Bing. N.C. 222; 44 Digest 83, 642. A
- (12) *R. v. Marshland, Smeeth & Fen District Comrs.*, [1920] 1 K.B. 155; 38 Digest 37, 220.
- (13) *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K.B. 213; 41 Digest 57, 412.
- (14) *A.-G. v. Tomline* (1880), 14 Ch. D. 58; 44 Digest 79, 606.
- (15) *Atkinson v. Newcastle & Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; B 38 Digest 56, 330.
- (16) *Johnston & Toronto Type Foundry Co. v. Toronto Consumers' Gas Co.*, [1898] A.C. 447; 10 Digest 1171, 8316.
- (17) *R. v. Selby Dam Drainage Comrs.*, [1892] 1 Q.B. 348; 41 Digest 59, 430.
- (18) *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93; 38 Digest 35, 209.
- (19) *Hesketh v. Birmingham Corp'n.*, [1924] 1 K.B. 260; 38 Digest 48, 280. C

ACTION for damages for the defendants' failure to repair a wall or bank at Barton-on-Humber in the county of Lincoln, and for negligence and nuisance and breach of their obligations under a private Act of 1793 (33 Geo. 3, c. xiv), by reason whereof on Sept. 15, 1935, the plaintiffs' premises at Barton-on-Humber were flooded by the waters of the Humber and the plaintiffs sustained damage. The facts are set out in the judgment. D

Tristram Beresford, K.C., and *A. S. Diamond* for the plaintiffs: The Dyke Reeves were under a continuing statutory obligation to maintain the bank for ever. Once they committed a breach of duty, act of God was no defence: *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katherine's Docks Co.* (9), per FRY, J., at p. 519; *Nichols v. Marstrand* (10). In this case the tide was not the highest recorded. It was also held by the Court of Appeal in the *Nitro-Phosphate* case (9), that riparian proprietors, such as the defendant company, are not exempted by such a statute from their liability for intermeddling with an existing river wall. There was a continuing failure to maintain the bank in its existing form. See *Lyme Regis Corp'n. v. Henley* (11); *R. v. Marshland, Smeeth & Fen District Comrs.* (12); *Boynton v. Ancholme Drainage & Navigation Comrs.* (13). As regards the defendant company, in circumstances such as these a landowner is under a duty to protect adjoining owners: *A.-G. v. Tomline* (14). E F G

Sydney Turner, K.C., and *Ifor Lloyd* for the Dyke Reeves: There is no absolute duty on the Dyke Reeves as alleged: See *Atkinson v. Newcastle & Gateshead Waterworks Co.* (15); *Johnston & Toronto Type Foundry Co., Ltd. v. Toronto Consumers' Gas Co.* (16). The land is not vested in the surveyors. If the wall was built before the bank, they could not interfere with it; if later, they could not prevent it: *Hudson v. Tabor* (1); H

Newcastle (Duke) v. Clark (2). The company could not be prevented from building, and in such a case the only remedy would be by indictment : *Behrens v. Richards* (3). The surveyors levy the rates. See *R. v. Selby Dam Drainage Comrs.* (17), and Land Drainage Act, 1930. Further, the
A surveyors' liability is for misfeasance only and not for nonfeasance : *Cowley v. Newmarket Local Board* (4). In any case, the duty to repair is in the landowners who elect the surveyors, not in the surveyors themselves : *Glossop v. Heston & Isleworth Local Board* (5) ; *Mersey Docks Trustees v. Gibbs* (18) ; *Hesketh v. Birmingham Corpn.* (19) ; *Blundy, Clark & Co. v. London & North Eastern Ry. Co.* (6).

N. L. C. Macaskie, K.C., and *G. H. B. Streatfeild* for the defendant company : If the wall was built earlier than the award, there is no duty, and if later, then the highest duty on the company is to maintain the substituted wall in such a condition as to prevent overflow, not to
C guard against exceptional risks : *Fobbing Sewers Comrs. v. R.* (8). Certainly there is no higher duty than that of the Dyke Reeves for whose banks the wall was substituted. As for the duty of repair, that is upon the Dyke Reeves under the award and statute, and they can levy on the company and other riparian proprietors to that end. At
D all events, the tide was an act of God.

BRANSON, J. : This action arises out of the flooding of the plaintiffs' land through the collapse of a wall belonging to the second defendants. The wall formed part of the sea defences of some 6,000 acres of land on
E the east side of Barton Haven on the Humber. The first defendants are the bank surveyors, or, as they have been called in the case, the Dyke Reeves, who are persons appointed under an Act of 1793 which provided for the making and maintaining of the sea defences to the said 6,000 acres of land. It is agreed that I shall deal only with the question
F of liability, leaving any question of damages that may arise for future ascertainment.

The case against the Dyke Reeves is that by virtue of the Act and the award made under it they have an absolute duty to maintain the sea defences to the land in question, and it is alleged that the wall which
G gave way had become part of these sea defences, so that the Dyke Reeves were responsible for the repair and maintenance of the wall. Their defence is, first of all, that they had no duty in relation to the wall at all and, secondly, that their duty, if any, was only to exercise reasonable care, and that in that they have not failed. Thirdly, it is said by them
H that if they did fail in their duty their failure was a nonfeasance for which no action would lie against them at the suit of the plaintiffs.

The case made against the second defendants is that the wall which gave way was a wall which had been made after their predecessors in title had cut through the bank on the shore of the Haven, and which

had been substituted for a length of 79 feet for that bank, and it is alleged that they thereby came under an absolute duty to maintain the wall, just as the Dyke Reeves had an absolute duty to maintain the bank, or, alternatively, it is said that the wall having been constructed as part of the building, and being when it was constructed a perfectly good defence, certain alterations made to the building in 1934 so weakened the wall as to cause it to become a danger, and that the second defendants by that act were guilty of negligence and of a nuisance, and thereby have become liable to compensate the plaintiffs for the damage which has accrued to them by reason of the failure of the wall. The second defendants' defences, stated shortly, are that the wall was erected before the bank, and that consequently they are under no liability to maintain it, or, secondly, if it was not so erected, but was substituted for part of the bank, their duty is only to take reasonable care to keep it efficient and to guard against ordinary risks, and that they say they have done.

The case turns, of course, in the first instance upon what is provided by the Act and the award made thereunder. The Act is a long one and is not divided into sections; but I think that I need refer only to a few passages in it. The first passage provides that the commissioners who were appointed under the Act to survey the lands in question, to build the banks and to allot various plots of what was originally common land and waste land and salt marsh to the various landowners affected by the scheme:

shall and are hereby also impowered and required to set out and appoint and cause to be made, erected, and completed . . . such banks, ditches, drains, water-courses, cloughs, bridges, stiles, and other requisites and conveniences in, over, through and upon the lands and grounds hereby intended to be enclosed as they shall deem proper and necessary, and the same respectively shall be made and erected and at all times hereafter repaired cleansed maintained and kept in repair, either by a parochial rate or assessment, or by such persons, and in such manner as the said commissioners shall direct and appoint.

Later it provides:

The said commissioners shall and they are hereby required and authorised to form and draw up or cause to be formed and drawn up, an award thereof, or instrument in writing which shall express the quantity in statute measure of the acres, rods and perches contained in the said fields, lands and grounds so intended to be inclosed as aforesaid and the quantity and contents of each and every parcel thereof assigned or allotted to the several parties entitled [and] shall also contain proper orders and directions for and concerning the laying out and making the public roads and the breadth thereof and for and concerning the laying out, making maintaining cleansing and keeping in repair the private roads and ways fences, ditches, banks, drains, bridges, gates and stiles hereby directed to be made.

Then it says:

The same award shall have annexed to it a plan of the said lordship and parish of Barton and of every person's distinct property therein after the division and allotments shall be made as aforesaid signed by the said commissioners in pursuance of that Act. The commissioners surveyed the land and they made an award in 1796, which reads:

And we the said commissioners have caused to be made and completed and we do award and appoint a bank extending from the Humber Bank in the lordship of

Barrow Westward over the allotments next to the River Humber and to the Haven of Barton aforesaid and thence extending southward on the east side of the said haven as far as the Butts Clough and also a bank from the said clough along the west side of the Butts drain . . . which said banks next to the River Humber are of the dimensions of 23 feet in the base, 5 feet in height and 3 feet in width at the top . . . And we the said commissioners do further award direct and appoint . . . that the said Humber banks and also the bank on the east side of an allotment of 289 acres 3 roods and 15 perches in the pastures awarded to George Uppleby and Sarah his wife shall from time to time and at all times hereafter be supported in their present form and dimensions and be kept of sufficient height to prevent the waters of Humber at high tides from overflowing thereof And that all the said public drains, . . . and also the said banks and jetties now made and that may hereafter be necessary to be made shall from time to time and at all times for ever

hereafter be cleansed, repaired, maintained, supported and kept in repair by a rate or assessment on all and every the owners for the time being of the lands and grounds divided and allotted by virtue of the said Act [in certain stated proportions] . . . And we do further order direct and appoint that such public drains, cloughs, banks, jetties and staunch shall be from time to time so cleansed, repaired, maintained, supported and kept in repair and such rate as aforesaid for the purposes thereof shall be made and levied by three persons being owners or occupiers of lands in Barton aforesaid to be annually elected surveyors of such public drains, cloughs, banks and jetties such election to be made by a majority in value of such of the proprietors of lands in Barton aforesaid allotted by virtue of this Act who shall be present at a vestry meeting in the parish church of Barton . . . and the persons so to be elected surveyors are to have and use a carriage road and way from the Butts Road into and over the enclosure of George Uppleby and Sarah his wife called the Brick Close adjoining to the Haven to the Butts Clough and shall and do any other necessary act therein for the purpose of repairs at the said Clough.

Those are the material statutory provisions. In view of the way in which the case is framed, the first question which arises for decision is whether the wall that failed was there before the bank was made or whether it came into being afterwards. If it was made before the bank was made it is not disputed that neither the Dyke Reeves nor the defendant company have any duty in respect of it towards the plaintiffs. That appears clearly enough from the case of *Hudson v. Tabor* (1).

[His Lordship reviewed the evidence and held that the malthouse was built after the bank had been completed.]

What in these circumstances is the liability of the Reeves in regard to that building? The main difficulty probably arises out of lack of accurate information as to how the predecessors of the second defendants came to make the breach in the wall which they subsequently filled up by building this malthouse. It is suggested that it must have been done by some sort of agreement with the Dyke Reeves. I find considerable difficulty in assuming any such agreement. There is nothing that I know of in the award or the Act which authorises the Dyke Reeves to come to any such agreement. Their duty is to maintain the wall and not to allow people upon any terms to make breaches in it. This also is clear, that the bank is not vested in the Reeves; but, on the other hand, there is nothing in the Act or in the award, or as it seems to me in probability, to suggest an intention in the legislature to shut off the owners of these inclosed lands from access to the haven. On the contrary, there is evidence that it is customary in this district for adjoining owners to cut through the bank and make barrow-ways to

enable them to get their merchandise from their works to barges in the haven, and that such cutting exists not only in the haven but also at other parts of this bank, and indeed the plaintiffs themselves occupy a tile works from which there run three barrow-roads through the bank to the shore of the haven. These barrow-roads are defended by sluices A which are movable to allow the passage of barrows, but can be closed to prevent the passage of water when the water rises. In those circumstances the next step also I think is clear, that as the bank was not vested in the Dyke Reeves they could not bring an action for trespass B against an adjoining owner who was proposing to cut through the bank for the purpose of getting access from his land to the haven. That is plain, I think, upon a case of the *Duke of Newcastle v. Clark* (2). It is equally clear that if the adjoining owner was proposing to make an opening in the bank and to fill it with an equivalent defence, such as this malthouse undoubtedly was when it was originally put up, the Dyke C Reeves would not have been able to stop him by injunction. That appears from the case of *Behrens v. Richards* (3). The peculiar position then arises that, whilst the Reeves are charged with the duty of maintaining the bank, they cannot prevent the owner of adjacent land from cutting through it and substituting an equivalent sea defence, and D there is no principle of law that I know of upon which I can hold that such a substitution enlarges the duty of the Reeves and compels them to maintain the substituted defence. Their duty was to maintain the bank. At this portion the bank has gone, and the bank has gone through the action of a third party whom they could not control, and it seems to E me upon the principle of *lex non cogit ad impossibile* the action against the Reeves must fail. If I am wrong in this, there still remains to the Reeves the point taken by Mr. Turner that, having regard to the position of the Reeves under the Land Drainage Act of 1930, and the cases of *Cowley v. Newmarket Local Board* (4), and *Glossop v. Heston & Isleworth F Local Board* (5), the failure of the Reeves being a mere nonfeasance, and in no sense a misfeasance, no action will lie against them for damages arising from the breach. The distinction between those cases and such cases as *Blundy, Clark & Co., Ltd. v. London & North Eastern Ry. Co.* (6), is stated very clearly by GREER, L.J., at p. 359 of that case. G

I turn, then, to the position of the defendant company. They are the successors in title to George Uppleby and Sarah his wife, and own the land upon which the bank stands, and land projecting beyond it to the banks of the Humber, and their predecessors in title cut through the sea defences which the Act of 1793 provides shall be maintained for H ever. Having done that, they put a wall there and, while the wall stands as an equivalent defence to the bank, they have not injured anybody; but as soon as the wall fails it seems to me that their position is the same as the position of one who has cut through the bank and left

A a gap through which the sea enters. It seems to me that their position is really analogous to the position of the defendant in *Rylands v. Fletcher* (7). They have created a danger which they must guard at all events. It is beyond argument that if these defendants' predecessors had cut a gap in the wall and left it unfilled they would have been liable to an action for damages at the suit of anybody who suffered through the admission of water through that gap, and therefore they have put themselves in the position in which they have an absolute duty to maintain the defence in as good a state as the defence which they have taken away. Now, B as originally erected I think it is plain upon the evidence before me that this lower wall of the malthouse did afford a defence at least as efficient as the sea bank; but when the upper portion of that building was removed and the floors were taken out, I think the facts show beyond any argument again that the strength of the wall had become C reduced below that of the sea bank. The sea bank stood against the tide in Sept., 1935, and the wall did not, and apart, therefore, as it seems to me from any question of negligence on the part of the present defendants they are responsible, as I have said, on the analogy of the case of *Rylands v. Fletcher* (7). But I think that is subject to this: it cannot D be, of course, that they must keep an unceasing guard upon this wall, and if they can show that some outside cause, such as the collision of a ship with the wall, had brought the wall down, their duty must, I think, be limited to replacing it as far as ever they can. I am conscious in saying that I am departing somewhat from the strict view of the E defendants' duty which was taken in the case of *Rylands v. Fletcher* (7). But the application of *Rylands v. Fletcher* (7) to the present case seems to me to be rather by way of analogy than by way of direct application. The defendants suggest that the real cause of the failure of this wall was that a ship called the "Buoyant" collided with it some three or F four days before the flood, and before they had any reasonable opportunity of making good the damage which that vessel did. In my judgment the attempt to prove that the "Buoyant" collided with the wall entirely fails, and therefore this part of my judgment is in a sense *obiter*, because once one has come to the conclusion that the collision G is not made out, it becomes unnecessary to consider with minute care what would be the liability of the defendant company if such collision had taken place. Otherwise I should have thought it right to go more closely into the application of *Rylands v. Fletcher* (7) to this case upon this point.

H One other point I think remains to be dealt with, that is the argument of the defendant company, that this tide was something in the nature of an act of God against which they had no duty to guard. Once one arrives at the conclusion to which I have arrived, that the duty upon the defendant company was to maintain a sea defence at least equivalent

to the bank, this point ceases to have any effect, because the bank stood up against the tide, and if this wall had been as strong a defence as the bank it would have stood up against this tide as well. But, be that as it may, I do not think it is possible to say that this tide was so high and so unexpected and incalculable as properly to fall within the definition of an act of God. On this point there is a passage in the decision of the Court of Appeal in the case of *R. v. Essex Sewers Comrs.* (8), to which I would like to refer. The passage occurs in the judgment of LORD COLERIDGE, C.J., on p. 574. He recites that in Mar., 1874, a tide occurred higher than any recorded before then, and he goes on to say this :

It is obvious that, as soon as it was shown by experience that a tide of the height of that recorded in Mar., 1874, might occur, the danger of its recurrence was a danger that could be foreseen in the future, and might be guarded against, whether it could have been foreseen in the past or not, and consequently that the owners of the sea-walls were bound to foresee and provide against it.

Now, here there have been higher tides than this, and one as recently as 1921, and as the height of the tide produced the pressure which caused the wall to collapse, it seems to me that it would be wrong to say that the height of this tide, which was less than that of a tide experienced so recently as 1921, could be regarded as an act of God within the definition of that expression in such cases as this.

That, I think, deals with all the points which have been raised before me, and the result is that in my view the defendant company is liable in damages for the failure of their wall to stand the pressure of the tide on this day in Sept., 1935, and that the case will have to go for an ascertainment of the amount of damages which the plaintiffs are entitled to recover against them.

Judgment for first defendants against the plaintiffs with costs. Judgment for the plaintiffs against the second defendants with costs.

Solicitors : *D. W. Drummond* (for the plaintiffs) ; *Stooke-Vaughan & Taylor* (for the first defendants) ; *Pritchard, Sons, Partington & Holland*, agents for *Andrew M. Jackson & Co.*, Hull (for the second defendants).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law.]

FARMER v. HYDE.

[COURT OF APPEAL (Slessor and Greene, L.JJ., and Luxmoore, J.),
February 9, 1937.]

A *Libel—Privilege—Reports—Judicial proceedings—Interruption—Application to the court—R.S.C., Ord. 39, r. 6—Law of Libel Amendment Act, 1888 (c. 64), s. 3.*

B During the hearing of a libel action a person who was neither a party nor a witness in the proceedings interrupted and said "May I make an application? . . . I want to contradict the many lies that have been told in this court." Only one witness had given evidence before the interruption. That witness brought an action for libel against several newspapers which had reported the interruption. After a summing up, which the Court of Appeal held to be a misdirection, the jury found in favour of the newspapers:—

C HELD: (i) as, owing to the misdirection, the jury had had no opportunity to assess damages, it was not possible to say that there had not been a substantial miscarriage of justice.

(ii) the application by the interrupter was made in the course of "proceedings" within the Law of Libel Amendment Act, 1888, s. 3, and fair and accurate reports of the interruption were therefore privileged.

[EDITORIAL NOTE. The question here is what is an interruption of judicial proceedings. In the present case the interrupter put his words into legal form by prefacing them with the words: "May I make an application?" This is held to make them part of the proceedings, so that a newspaper report of them, where the remarks are defamatory, is privileged. There is a second question as to when there is substantial miscarriage of justice by reason of misdirection. If as the result of such misdirection the jury have no opportunity of assessing damages, even though it may seem clear that they could not assess them at more than a nominal amount, there is such a miscarriage of justice within R.S.C., Ord. 39, r. 6.

E AS TO WHAT ARE JUDICIAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 461, 462, para. 563, note (u); and FOR CASES, see DIGEST, Vol. 32, pp. 135-137, Nos. 1655-1671. On the point under R.S.C., Ord. 39, r. 6, see YEARLY SUPREME COURT PRACTICE, 1937, pp. 708, 709.]

F Cases referred to:

- (1) *Bray v. Ford*, [1896] A.C. 44; 32 Digest 164, 1988.
- (2) *Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency*, [1919] A.C. 304; 32 Digest 113, 1453.
- (3) *Lynam v. Gowing* (1880), 6 L.R.Ir. 259;
- G (4) *Hope v. Leng (W. C.) & Co. (Sheffield Telegraph), Ltd.* (1907), 23 T.L.R. 243; 32 Digest 140, 1711.
- (5) *Usill v. Hales* (1878), 3 C.P.D. 319; 32 Digest 135, 1665.
- (6) *Delegal v. Highley* (1837), 3 Bing. N.C. 950; 32 Digest 135, 1663.
- (7) *Ryalls v. Leader* (1866), L.R. 1 Exch. 296; 32 Digest 137, 1671.
- (8) *Wason v. Walter* (1868), L.R. 4 Q.B. 73; 32 Digest 144, 1754.
- H (9) *Kimber v. Press Assn.*, [1893] 1 Q.B. 65; 32 Digest 136, 1666.

APPEAL from a judgment of MACNAGHTEN, J., dated Feb. 25, 1936. The facts of the case are fully set out in the judgment.

Martin O'Connor, for the appellant: If there was a misdirection, this court cannot assess the damages that would have been given by a jury.

What is the province of a jury cannot be taken from them ; the jury never had an opportunity of considering the question of damages. The Court of Appeal can deal with damages only with the consent of the plaintiff. [Counsel referred to *Bray v. Ford* (1).]

Sir William Jowitt, K.C., and H. C. Marks for the respondents: A
There cannot be said to have been a substantial miscarriage of justice where a man, who might have been awarded a farthing damages, got nothing. [Counsel referred to R.S.C., Ord. 39, r. 6, *Bray v. Ford* (1), and *Lionel Barber & Co. v. Deutsche Bank (Berlin) London Agency* (2).] B
The papers were perfectly entitled to report an interruption made in open court. An entirely irrelevant interruption cannot be reported, but it has never been suggested that, where a man puts himself before a judge and makes an application, that cannot be reported. C
The case is within the Law of Libel Amendment Act, 1888, s. 3 ; it was a fair and accurate report ; it was contemporaneous ; and it was in a newspaper. The only question is, was it in proceedings before the court ? D
The history of this type of case is as follows. In *Delegal v. Highley* (6), it was held that an interruption was not reportable. In *Ryalls v. Leader* (7), it was laid down that the test was what occurred in the court. In *Wason v. Walter* (8), it was held that reports of what takes place in Parliament are permissible. In *Usill v. Hales* (5), it was held that a fair report of *ex parte* proceedings before a magistrate was allowable. E
In *Lynam v. Gowing* (3), a newspaper report included an entirely irrelevant interruption, accusing a witness of perjury, it was held that this was not reportable. In *Kimber v. Press Association* (9), a report, made fairly and without malice, of *ex parte* proceedings before magistrates on an application for the issue of a summons for perjury, was held to be allowable. F
In *Hope v. Leng (W. C.) & Co. (Sheffield Telegraph), Ltd.* (4), it was held that a remark made by a litigant in court, though not in the witness-box, was reportable. The present case is distinguished from those (such as *Lynam v. Gowing* (3)), where an outsider shouts out something in court. It is wholly different where a man asks if he can make an application ; that is part of a proceeding.

O'Connor, in reply : It is an abuse of language to call this interruption part of any proceedings. It was a most improper attempt to vilify G
the plaintiff in the hope that it would succeed by being published. "Proceedings" means an action, or a step in an action. Davidson had no proceedings pending. This was an unjustifiable interference with the course of justice, which the papers ought not to have reported. H
[Counsel referred to *Usill v. Hales* (5).] An interruption is not part of any proceedings. The interrupter was not a judge, advocate, party, or witness, and there is no protection for anyone else. The test is, could he have been sued for what he said ? He clearly could have been. He could not have pleaded privilege. Why should the newspapers ?

A SLESSER, L.J. : This is an appeal from a judgment of
MACNAGHTEN, J., sitting with a jury, in a libel action. The action was
of a rather unusual kind, brought against a number of companies and
persons who were proprietors of 5 newspapers. All consolidated their
defences, and it is in respect of words which appeared in substantially
the same form in all the papers that the present action and appeal has
been brought. The plaintiff had been the plaintiff in another action,
which was an action for libel brought against 2 other newspapers. Those
actions also were consolidated. The libel there complained of as pub-
lished of the plaintiff was in respect of the proceedings between the
plaintiff and his wife, which had been heard before the magistrates at
Southend on June 29, 1934. During that libel action, the name of a
Mr. Harold Davidson, who was formerly the rector of a parish in Norfolk
called Stiffkey, was mentioned in the proceedings, and Serjeant Sullivan,
who then appeared in those proceedings, appears to have criticised very
severely—no doubt upon proper instructions—the behaviour of this
Mr. Davidson. Now, the only witness who gave evidence in the case
was the plaintiff. His evidence having been given, Mr. Davidson, whose
behaviour at various times had been commented upon adversely, both
by Serjeant Sullivan and in the evidence, said to the judge during the
course of the proceedings :

May I make an application ? I am the rector of Stiffkey, and I want to contra-
dict the many lies that have been told in this court.

E That intervention reported in the newspapers is the basis of the
present action. To quote one case, in *The Eastern Daily Press* there
appeared the following :

F It was when Mr. Terence O'Connor, K.C., rose to open the defence that Mr.
Davidson, who was wearing a clerical collar, stood up in court and shouted : " May
I make an application ? " " Who are you, sir ? " the judge demanded. " I am
the rector of Stiffkey, and I want to contradict the many lies that have been told
in this court," was the reply. " You mean," said HAWKE, J., " that you are
Mr. Davidson. Then you will sit down." " I have a precedent for it," Mr.
Davidson exclaimed.

G Whether he meant that he had a precedent for sitting down, or what he
meant, is not clear ; but, in any event, that is the report of the pro-
ceedings, and there is no question as to what happened. Upon that,
it was said by the plaintiff, in his action against the newspapers reporting
this matter : " This is defamatory upon me. I am the only person who
has given evidence in this court, and this statement of Mr. Davidson
that he wanted to contradict the many lies can refer only to my evidence,
H and thereby I am held up to the world to be a liar and a perjurer and
a person who gives false evidence in a court of law." Upon that, issue
was joined, and the defence, admitting that the words were spoken in
the manner described, said that the words were not meant or intended
or understood to bear, or were incapable of bearing, the meaning alleged,

or any meaning defamatory of the plaintiff. The defendants also relied by way of defence upon the Law of Libel Amendment Act, 1888, s. 3.

With regard to the first matter, complaint has been made here that the judge, in summing up the case, had misdirected the jury. [His Lordship found that there had been misdirection of the jury sufficient to justify a new trial.] The point taken by Sir William Jowitt is that, under R.S.C., Ord. 39, r. 6, a new trial should not be granted on the ground of misdirection unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage has been occasioned. He argued that, assuming that the jury had been properly directed, not that they should return a verdict for the defendants merely because of the bad reputation of Mr. Davidson, but that they should return a verdict for nominal damages of one farthing, according to their verdict they either took that view, or ignored that direction, and acted on the other part of the summing-up which was correct; and, on either view, either because they found for the defendants, or because the most that they could give would be one farthing damages for the plaintiff, there is here no substantial miscarriage of justice. I have come to the conclusion that that argument is ill founded in the present case. I think that a general consideration of the authorities leads one to the view that, where you are dealing with general damages, and where, through misdirection or other impropriety in the case, it cannot be said that the jury have addressed their minds to the question of damages at all, it is not right for us to speculate as to what damages they would have given had they received a proper direction. That view seems to me to be consistent with the various authorities to which we were referred, and I think it is quite clearly the result of the decision in *Bray v. Ford* (1). I think the later case of *Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency* (2), dealing, as it does, with a case where there could have been a dissection of the special damage, and where it was said that misdirection could not affect that matter, does not really deal with the point that we have here to consider. I think it is impossible to say that a substantial miscarriage of justice has not occurred here, not because the damages might be larger than one farthing, but because the jury have never had an opportunity of assessing damages at all.

In those circumstances, Sir William Jowitt is concerned to rely upon his second statutory defence, and, in my opinion, that defence is a complete answer to the present action. By the Law of Libel Amendment Act, 1888, s. 3, it is provided :

A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged.

Now, I ask myself, this admittedly being a fair and accurate report, was it a report of proceedings publicly heard before any court ? With

regard to that, a number of cases was cited to us, the effect of which appears to me to be this, that, whenever something is done, in the course of proceedings, which is in any way related to the proceedings as such, and can be done in the proceedings, that may properly be said to be
A “proceedings publicly heard,” and a report of it may be said to be protected. The cases range over a number of different matters, but it is perhaps convenient to deal with a case in which it was decided that something did not constitute a report of public proceedings, and that is the Irish case, *Lynam v. Gowing* (3). That was a case where, there being
B an inquisition held by a coroner, Father Callary, a Catholic priest, stated, in open court, that part of the plaintiff’s testimony was “very little short of perjury.” He had not been sworn as a witness, he was making no application to the court, and, as I read the judgment, his intervention was wholly irrelevant to the proceedings which were before the tribunal.
C As DOWSE, B., says, on p. 268 :

The words alleged to have been used by Father Callary form no part of the proceedings of the coroner’s court. In any well-regulated court the person using these words would have been turned out of court, or at the least reprimanded by the judge.

D Now, that case may be usefully contrasted with a case in which also observations of a defamatory nature were made, though not in the witness-box. In the case of *Hope v. Leng (W. C.) & Co. (Sheffield Telegraph), Ltd.* (4), a Mr. Muir Wilson, who had been sworn, and had
E been a witness, shouted out from the body of the court, after his examination had been concluded, some defamatory matter. He said he had found that certain facts were false, and a pack of lies from beginning to end. In that case, there being a report of those matters, the court, while doubting whether, if he had not been a witness, and had had no
F concern with the matter at all, it would have been privileged, came to the conclusion that, in so far as he had made the statement after he had taken the oath, they thought it might have been elicited by questions which had been directed to him. COLLINS, M.R., says, at p. 245 :

G It was a comment made by him when he was still under the obligation of the oath. It would be too nice to exclude from the privilege accorded to fair reports a report of an observation made under those circumstances.

The other line of cases which I think it is here material to consider is the class of case where a party has applied *ex parte* to magistrates or other authorities for some legal redress. Under this head, I would
H mention the case of *Usill v. Hales* (5). There :

Three men who believed themselves to be aggrieved by the conduct of the plaintiff in respect of a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the Master and Workman’s Act. The magistrate declined to entertain the application, considering it a matter for a civil and not for a criminal court.

It appears that, in that case, there was really a claim for breach of contract, but the plaintiffs sought to promote a criminal process. The court therefore had no jurisdiction, and the application had in law improperly been made to it. Nevertheless, the court held that the matter could properly be said to arise in judicial proceedings. It was A said by LOPES, J., as he then was, on pp. 328 and 329 :

On principles of public convenience, the ordinary rule is that no action can be maintained in respect of a fair and impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals. It was urged that the matter in respect of which the application was made was not within the jurisdiction of the magistrate. But the cases are clear to show that want of jurisdiction will not take away the privilege, if it is maintainable on other grounds. Nor do I think the privilege is confined to the superior courts. B

Now, in the present case, as it seems to me, the application which Mr. Davidson made to the court was clearly in the course of the proceedings. Mr. Martin O'Connor has tried to impress upon us the fact C that the application was of a malicious kind, and contained defamatory matter. Of course, the whole section is based upon the assumption that something defamatory will be said in the course of proceedings, because otherwise it is not necessary to seek its protection, but I think the right way to look at the matter is to consider, if the application had D been made without any reference to lies at all, and Mr. Davidson had said : " May I make an application ? I am the rector of Stiffkey, and I want to contradict the *statements* that have been made in this court," instead of using the word " lies." In such a case, we should be brought within the ambit of cases which are constantly happening in the courts, E in which parties, either by themselves or by counsel, seek, either with or without success—and generally, I think, without—to get the judge to allow a statement to be made on their behalf. Strictly speaking, although the judge may have jurisdiction to hear them, he has no jurisdiction to decide anything, because there is no issue and no *lis* in which F they are concerned. Nevertheless, it is clear, to my mind, that such an application would be made " in the course of the proceedings," and it does not, to my mind, make any difference that, in the course of the application, defamatory matter is published about somebody else, which is the matter with which the section deals, or that it is done with a G malicious mind. I do not know, and it is impossible to say, but it may be that the workmen in *Usill's* case (5) may have wanted to embarrass the employers.

It is sufficient for us to consider whether this application, which was made to the judge by Mr. Davidson—not interposed by a bystander in H the court, as in the Irish case—was in the nature of proceedings publicly heard before any court. I think it was, and, so far as these newspapers are concerned, it was a fair and accurate report of those proceedings, and, consequently, the statute affords to the owners of those newspapers a

complete protection. For that reason, I think that this appeal must fail.

GREENE, L.J. : I agree.

LUXMOORE, J. : I agree, and have nothing to add.

A *Appeal dismissed with costs.*

Solicitors : *Vivian J. Williams & Co.* (for the appellant) ; *Theodore Goddard & Co.* (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

B

SHELDON v. SHELDON (TOWNLEY formerly MURRAY intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **January 26, 27, 28, 29, February 2, 3, 1937.**]

C

Divorce—Wife's petition—Petitioner's adultery—Prostitution—Husband conducting adultery—Discretion.

A petitioner for divorce had admittedly, over a period of years, both before and after she left her husband, committed adultery in the nature of prostitution. It was found that the husband was aware of the fact, acquiesced in it, had received money which he knew was being obtained by prostitution, and that his treatment of her conduced to her adultery. The petitioner asked for the exercise of the discretion of the court in her favour :—

D

HELD : the discretion of the court ought to be exercised in the petitioner's favour on the ground that (i) it was not in the interests of the state that the present state of affairs should continue, and there was no chance of the parties being reconciled ; (ii) a divorce would give the petitioner her one chance of living a decent life again ; (iii) it was in the interests of the child of the marriage.

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[**EDITORIAL NOTE.** This case is the first occasion upon which the discretion of the court in granting a divorce to a petitioner guilty of adultery has been exercised in favour of a petitioner living in prostitution.

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AS TO THE EXERCISE OF THIS DISCRETION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 686-690, paras. 1019-1025 ; and FOR CASES, see DIGEST, Vol. 27, pp. 359-367, Nos. 3446-3538.]

Case referred to :

(1) *Apted v. Apted & Bliss*, [1930] P. 246 ; Digest Supp.

G

PETITION for dissolution in which the wife petitioner asked for the exercise of the discretion of the court in her favour.

The parties were married on Feb. 28, 1922, and there was one child of the marriage, a son born in that year. The petitioner in her petition charged the respondent with cruelty and alleged that during the year 1935 he had committed adultery with the intervener, Miss Dora Murray, now Mrs. Townley. The petitioner stated that her own adultery had been brought about by the respondent's conduct. The respondent and the intervener in their answers denied the charges and in a cross-prayer for dissolution alleged that the petitioner had lived a life of a prostitute.

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Norman Birkett, K.C., and *Noel Middleton, K.C.*, for the petitioner.
R. H. Bayford for the respondent.
Victor Williams for the intervener.

BUCKNILL, J. : In this case there is an admission by the petitioner A
 that she has over a period of many years committed adultery and com-
 mitted adultery in the nature of prostitution. I have to consider, that
 being the case, whether I ought to exercise my discretion, as it is called,
 and grant her a decree notwithstanding. Now, that raises a very
 important question which has been debated here at great length, as to the B
 husband's conduct to his wife, and the conduct of the husband to the
 wife is also raised on his counterclaim, so to speak, for dissolution.
 The statute says that if the petitioner has during the marriage been
 accessory to or has connived at the adultery of the wife his petition shall
 be dismissed. He is not the petitioner, he is only the cross-claimant, C
 but still it does seem to arise indirectly on his prayer for dissolution.
 That question has been debated at great length and the whole question
 of the married life of this couple has been investigated. The parties
 have come and told two stories which are utterly irreconcilable. The
 petitioner's story is this : "I was seduced by my husband when I was D
 only just 17 and he was 30. He lost his job in consequence. We were
 married because I was pregnant ; I had a child a few months after the
 marriage. We went to live with my mother, who had only two rooms
 and a kitchen and who was at work all day and slept at home at night.
 My husband almost from the beginning of the marriage treated me with E
 cruelty, beat me, gave me no money, forced me in the end to go on the
 streets and earn money there, took it from me when I came home and
 cursed me if I had not earned enough." That is her case. Of course,
 it is a very serious charge to make against a man ; I can hardly imagine
 a more loathsome charge. On the other hand, the husband says : F
 "I was a very good husband. I gave my wife regularly £2 10s. a week
 except during the very short intervals of time when I was out of work.
 I never struck her although she sometimes struck me. I treated her
 with great kindness and consideration. I knew nothing whatever about
 the way she was earning money until shortly before she left me. When G
 I did find out my one desire was to reclaim her. I tried to reclaim her,
 but my efforts were unsuccessful."

After hearing the evidence of the husband and the wife on that matter
 without hesitation I accept the evidence of the wife. The conclusion
 I have come to on this aspect of the case is that the respondent did H
 know much earlier than he says he knew what his wife was doing, that
 he acquiesced in it, that after she had left him he did ask her for money
 which he must have known was being obtained by prostitution and
 that her adultery was conducted to by his treatment of her. If this case

had been brought in 1928 when she left him I have no doubt whatever that she would have got her decree without any serious difficulty. To my mind the most difficult part of the case is the fact that she continued to live in this way right on from 1928 to 1934, after she left her husband and at a time when she cannot say her husband was in any way forcing her to do this or that he was in any way directly or indirectly responsible, except in this way, that he had in my view made it impossible for her to go back to him; he had failed to provide her with a proper home and he failed to keep up the payments of 25s. a week which he covenanted to do.

That being so, the question I have to decide is whether I ought to grant a decree in this case. LORD MERRIVALE, P., in *Apted v. Apted & Bliss* (1), at p. 259 says this :

Reviewing the cases in question as a whole these principles appear: in every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration; a strong affirmative case is necessary before a judge is justified under the statutes in negating their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality; if it is not unlikely to do so that is an argument against leniency.

Certainly it would be lamentable if the result of this case were to be that persons who had lived in the way Mrs. Sheldon had lived during these years could come here and get a decree except on very substantial grounds indeed. Now, do those substantial grounds exist? First of all, I think one must consider the case from the point of view of the interests of the state. Can it be in the interests of the state that this dreadful state of affairs should go on, assaults, police court prosecutions, molestations of the wife by the husband, taking of money by him earned in prostitution? It seems to me to be a state of things which ought to be brought to an end if possible. Moreover, this case in itself illustrates the great undesirability of allowing this sort of condition of things to go on. The intervener said, and I thought with a great deal of force, that she was the victim of circumstances; she has been brought here because the husband and wife are living in this sort of way, and she, out of sympathy no doubt for the man who has told her his story, has allowed her better judgment to be over-ridden. On the other hand, if I refuse to grant a decree in this case I see no possibility whatever of Mrs. Sheldon living a decent life. This is her one chance of escape, her one chance of living a decent life again. If I refuse to grant this decree she must in my view almost inevitably go back to the same horrible life which she has been living. Then there is the child to be considered. I think it is in the interests of the child that some decent home should be set up if possible, and I cannot imagine anything more dreadful than that this state of things should continue so far as his interests are concerned. Then again, as I say, as far as the husband

is concerned, he himself asks for a decree, he apparently wants a dissolution of the marriage. Both these parties have said quite frankly they hate each other, there is not the slightest chance of their going back to each other and being reconciled. Unless I were to grant this decree the wife, having committed these grievous errors, must be punished and kept in the same dreadful servitude for ever. Having considered all the facts and the terrible history of the case I can see no ground why I should not grant her a decree, and I am very glad to do so. A

Solicitors: *Lewis & Lewis* (for the petitioner); *H. Hartley Russell* (for the respondent and the intervener). B

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re OSSEMSLEY ESTATES, LTD. C

[CHANCERY DIVISION (Clauson, J.), **January 28, 1937.**]

Sale of Land—Conditions of sale—Misleading condition—Slight inaccuracy—Waiver—Law Society's General Conditions of Sale, cl. 9 (4).

The real estate of a testator was by his will subjected to a yearly perpetual rentcharge of £300. Upon the sale of part of the land, thirty years before the present proceedings, part of the purchase money had been paid into court, and this money with certain securities, formed a fund in court sufficient to provide for the annuity. Upon the former sale, the land then sold had been declared by the court to be free from the annuity, but no application and no declaration had been made in respect of the testator's other real estate. The land now contracted to be sold remained, therefore, subject to the rentcharge, but could at any time be freed from it by an application to the court. These lands were identified as the blue and the green land. The blue land was made the subject of a special condition, stating that it was "at one time subject to" the rentcharge, but that the purchaser should accept the fund in court as a full and sufficient indemnity. The green land was not stated to be subject to the rentcharge. In the course of the investigation of title, it was discovered that the green land was also subject to the rentcharge. The purchaser then objected that the blue and green lands were still subject to the rentcharge, and contended that the fund did not provide an indemnity. No objection was at this time taken to the fact that the green land had not been mentioned in the special condition. The vendor replied on May 19, 1936, that the position had been fully explained at the time the agreement for sale was entered into, and that the purchaser was bound by the special condition, which was the same as that under which the vendor had purchased. No reply to this answer of the vendor was made until July 14, when the purchaser stated that he had been advised by counsel that the special condition was a misleading one, and intended to take out the present summons. The present summons sought a declaration that the purchaser was entitled to compensation in respect of the fact that the blue land and the green land were still subject to the rentcharge, and that there was no such indemnity as the special condition represented. The vendor relied upon the incorporation of the Law Society's General Conditions, which required an answer to an objection within 7 days, and further contended that, although the rentcharge was still in fact in existence, the fund in court provided in effect a full indemnity, and, by a proper D
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application to the court, the land could at any time be freed from the rentcharge :—

HELD : (i) as regards the blue land, the special condition was not misleading, although it stated inaccurately that the land was "at one time subject to" the rentcharge, whereas the land was theoretically still so subject.

(ii) as regards the green land, the condition was misleading, but the purchaser, by the form of his requisitions, had waived any objection on that ground.

(iii) the failure to answer the vendor's reply to his observation on the answer to the requisition must be treated as an acceptance by the purchaser of the reply as satisfactory within the meaning of the Law Society's General Condition in that respect.

[EDITORIAL NOTE.] This case is of purely conveyancing interest. As to the blue land, a slight misstatement in a special condition is held not to have misled the purchaser, and it is further held that he is getting in fact the title he contracted to purchase. As to the green land, the position is very different. In this case the condition was misleading, but the purchaser is held to have waived his objections.

AS TO MISLEADING CONDITIONS, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 318, para. 537, AND FOR CASES, see DIGEST, Vol. 40, pp. 71-73, Nos. 553-567.]

Cases referred to :

- (1) *Palmer v. Johnson* (1884), 13 Q.B.D. 351 ; 40 Digest 105, 829.
- (2) *Hughes v. Jones* (1861), 3 De G. F. & J. 307 ; 40 Digest 127, 1009.

VENDOR AND PURCHASER SUMMONS, whereby the purchaser, Ossemsley Manor Development, Ltd., under an agreement dated Feb. 24, 1936, claimed against the vendor, Ossemsley Estates, Ltd. :

A declaration that the purchaser was entitled to compensation in respect of (i) the fact that the part of the land (identified as the "blue" land) the subject matter of the contract being subject to a certain perpetual rentcharge of £300 and (ii) the fact that another part of the said land (identified as the "green" land) was still subject to the said rentcharge and/or that there was no such indemnity against the same as represented by the said agreement.

By cl. 9 of the agreement, which was stated to be subject to the Law Society's General Conditions of Sale, it was stated that the blue land :

was at one time subject to (a) a yearly rentcharge of £300 charged thereon (with other property) by the will and codicil of George Arthur Brett deceased in favour of his daughter . . . but with the benefit of the indemnity against such rentcharge provided by a fund in court to the credit of the action *Re Brett, Brett v. Le Marchant* (1880 B. No. 2361). The purchaser shall accept such fund as a full and sufficient indemnity against the said rentcharge and shall not require the property sold to be released therefrom or any further or other indemnity in respect thereof or make any objection or requisition whatsoever in respect of the said rentcharge or the fund in court.

The history of the rentcharge and of the fund in court is fully set out in the judgment herein. Nothing was said in the agreement about the green land being subject to the said rentcharge, and the abstract of title was delivered by the vendor to the purchaser on Feb. 26, 1936. The purchaser delivered its requisitions on title on Mar. 31, 1936, and, as the result of a query raised therein, the vendor, on Apr. 14, delivered, with

the replies to the purchaser's requisitions, a supplemental abstract, commencing with the will of the said G. A. Brett. From that supplemental abstract it appeared that the green land as well as the blue was subject to the said rentcharge, and in No. 5 of the observations on replies to requisitions on title, the purchaser pointed out that as the company was purchasing the land in question for development as a building estate, it was important that it should have a clear title, and that it would be obliged to issue a summons under the Law of Property Act, 1925, s. 50, asking for an order allowing the payment into court of such sum (if any) as might be necessary to comply with the requirements of that section, and declaring that both the blue and the green lands were freed from the said rentcharge, and that it had thereby necessarily incurred costs and expenses. On May 19, 1936, the vendor delivered the replies to the purchaser's observations, in which it was stated that the purchaser was aware of the condition as to the rentcharge before the agreement was signed. The purchaser did not answer that reply beyond a bare acknowledgment, and nothing further occurred until July 14, 1936, when the purchaser wrote to the vendor saying that it was advised that cl. 9 (a) of the agreement was misleading, and that the company was entitled to compensation in respect thereof, and proposing to take out a vendor and purchaser summons unless the vendor was prepared to take out a summons under the Law of Property Act, 1925, to exonerate the land from the rentcharge. As the vendor was not prepared to make the application suggested, the purchaser took out the present summons. In addition to relying on cl. 9 (a) as an answer to the purchaser's application, the vendor contended that, although the rentcharge was still charged on the blue and green lands, the purchaser in fact was fully indemnified in respect thereof by the fund in court, which was fully sufficient to meet any claim of the owner of the rentcharge, and, further, the vendor relied on the Law Society's General Conditions of Sale, cl. 9 (4), which provides :

An answer to any objection or requisition shall be replied to in writing within 7 days after the day of the delivery thereof, and if not so replied to shall be considered satisfactory—

and said that, as the purchaser had not objected to the vendor's reply of May 19, 1936, until July 14, 1936, the said reply must be taken as satisfactory, and that no objection could subsequently be raised to it.

M. R. C. Overton, for the applicant company, the purchaser : Cl. 9 (a) is misleading even in regard to the blue land, as the rentcharge is still charged on that land. The purchaser is entitled to a fund which indemnifies the land which it has agreed to purchase. The fund in court is created by the sale of other parts of the real estate of the testator who created the rentcharge. It is not everybody who is entitled to any part of the real estate who is entitled to the benefit of that fund. The fund

A in court may depreciate, and may not in the future be sufficient to indemnify the purchaser if a claim is made against it in respect of the rentcharge. If the fund in court is sufficient to discharge the rentcharge, then, on an application by the owner of the land, the court, as a matter of course, would declare that the land was free from it, and the vendor should have made that application. As there is, at the moment, such an application before the court by the purchaser, this question really resolves itself into this, that the purchaser shall be compensated for the costs of that application. Whatever may be the position of the blue B land, the purchaser is clearly entitled to compensation in respect of the green land, which was not mentioned in cl. 9 of the agreement, under the express condition for compensation in the agreement.

C *H. O. Danckwerts*, for the respondent company, the vendor : Even if the statement in cl. 9 of the agreement is not strictly accurate, that does not matter, as it was accepted by the purchaser. The only part of it which is really untrue is in respect to the green land, and the purchaser's requisitions refer to the green land as well as to the blue, both of which are subject to the same rentcharge, which is the rentcharge to which the fund in court is referable. Even if the purchaser is entitled to object D to cl. 9 of the agreement on this ground, it did not make the objection in time under the Law Society's General Conditions of Sale, cl. 9 (4). But it is clear that, after the delivery of the supplemental abstract, the purchaser must have known that the rentcharge affected the green land as well as the blue, so that it has not in fact been misled.

E It was the Law of Property (Amendment) Act, 1926, s. 1 (2) (b), which made it possible for such a title as we have here to be offered to a purchaser. Under the Settled Land Act, 1925, land subject to a rentcharge would have been settled land. As, therefore, this title is recognised as a proper one to offer, it is proper to oblige a purchaser to accept such F a condition as cl. 9 in his contract of sale, which, apart from the mistake in not referring to the green land, is a perfectly clear condition.

G *Overton*, in reply : The Law Society's General Conditions of Sale, cl. 31, provides that mistakes must be pointed out before completion, and the purchaser's original requisition 5 is sufficient to bring it within that clause. The liability of a purchaser is to deliver requisitions of title within the proper time, and, if the replies to them are not satisfactory, he must deliver observations within 7 days. But, having complied with those two conditions, he has not to go on requisitioning.

H *CLAUSON, J.* : But the point that the green land was not in a different position from the blue land was never mentioned, even in the letter of July 14, 1936. Does that not show that the objection with regard to the green land had been waived ?

Overton : Whatever view is taken as to cl. 9 of the General Conditions of Sale, I am entitled, under cl. 31, to demand compensation at any

time before completion. If it were not for this condition, I could get compensation even after completion; see *Palmer v. Johnson* (1). Nor are cls. 9 and 31 inconsistent. Cl. 9 refers to cases where the purchaser would be entitled to reject the title. Cl. 31 says that, even if he has lost his right to reject the title, he is yet entitled to compensation: see *Hughes v. Jones* (2), at p. 316. A

CLAUSON, J.: The agreement is an agreement for the sale of some red land, some yellow land, some blue land, and some green land, and it contained this provision: [his Lordship read cl. 9 of the agreement.] B
There is no special condition relating to the green land, but an abstract was delivered, from which it appears quite clear that both the blue land and the green land were subject to such a rentcharge as is described in this clause. Some further information was asked for, and some further information was supplied, and that further information showed what C
the fund in court was, and how it arose. The fund in court arose in this way: a considerable amount of land, including the land which is the subject matter of the present sale, and also including some quite different land at Willesden, was part of the real estate of a testator, whose estate was being administered by the court. With the proper D
consents, and under the proper directions, the land at Willesden was intended to be sold, and the purchaser of the land at Willesden seems to have taken objection that the whole of the testator's real estate was subject to a perpetual yearly rentcharge of £300 in favour of a daughter and her issue. Steps were accordingly taken to clear the title, and E
provide for the purchaser of the Willesden land having a title clear from the rentcharge. What was done was this. The purchaser of the Willesden land was authorised to pay into court a sum of £1,200 out of his purchase money (a sum which was, of course, wholly insufficient to provide in full for the rentcharge), and it was ordered that, upon the F
purchaser of the Willesden land paying this comparatively small sum into court, to the account of the rentcharge of £300 a year, and upon a sum of Consols, already in court, which represented other real estate of the testator, being carried over to the same account—so that there would be sufficient money in the rentcharge account to produce, by G
annual income, the amount of the rentcharge—the parties interested were to be at liberty to apply for an order declaring that the Willesden land should be free from the rentcharge. In due course, the sum to the account of the rentcharge fund was built up in the way I have indicated, and an application was made, the effect of which was to free the Willesden H
land from the burden of the rentcharge. For some reason, which I do not suppose anybody now will ever discover, because all this was 32 years ago, the further step was not taken of obtaining an order discharging the rest of the testator's real estate from the rentcharge, although there was

a sufficient sum placed in the rentcharge account amply to secure the owner of the rentcharge, and so preclude him from having any recourse to the remaining lands. All this story came out when the supplemental abstract was delivered, and, of course, that leaves this position: the

- A rentcharge was still issuing out of the land that was the subject of the present sale, but, having regard to the fact that this fund was in court, there would be ample protection to any purchaser of this land, because the rentcharge owner would have the fund in court to which he might have recourse. This land was, however, still subject to the rentcharge.
- B I ought also to say this: it appears, from other orders of the court, and there is no doubt about it, that this fund, which was carried to the account of the rentcharge, so far as it is not required to meet the rentcharge, belongs to one C. E. Brett, who was the person who ultimately became absolutely entitled, subject to the rentcharge, to the real estate
- C of the testator whose estate was being administered by the court.

- The land with which I am concerned on the present summons was all land which, from time to time, was conveyed by C. E. Brett to various purchasers with the benefit expressly of the indemnity of the rentcharge-fund in court. That means that any purchaser of the land so conveyed
- D would be in a position to put a stop order on the rentcharge fund, and so to put himself in the position that the rentcharge fund could not be dealt with without notice to him. Until he received such a notice, he would know that the rentcharge fund was there to meet the rentcharge. There is, of course, no order expressly giving a purchaser of
- E land from C. E. Brett any express rights to the fund. If the rentcharge-holder proceeded to enforce his rights against a purchaser of land from C. E. Brett, and that purchaser had to pay the rentcharge-holder, he would be in a position to come to the court, and ask to be indemnified against that payment out of the fund. The only persons who could
- F oppose his being so indemnified would be C. E. Brett, or persons claiming under him, or the rentcharge-holder. The rentcharge-holder could not object, because he cannot have it both ways. If he gets his money out of one fund, he cannot expect to have it out of the other. C. E. Brett, and those claiming under him, cannot object because he has sold the land
- G on the footing that the purchaser from him is to be entitled to the benefit of the indemnity provided by the rentcharge fund. In other words, any purchaser of this land from C. E. Brett has certain rights which the court would enforce, and which would protect him from being ultimately made liable to bear the rentcharge which is still, as a matter of dry law,
- H issuing out of the land which he purchased.

With that in mind, let me look at the terms and conditions, and see what the position was upon the present sale of the bargain between the purchaser and the vendor. It refers only to the blue land—I will deal more in detail with the green land later. Let me read the clause again,

and see, in the light of what I have stated, what its meaning and operation is :

The property described in the second part of the first schedule [the blue land] was at one time subject to (a) a yearly rentcharge—

A

That, of course, is not strictly accurate ; it is still subject to a rentcharge, although there is this machinery for protecting the owner against liability for the rentcharge ; but that inaccuracy does not matter, because it quite plainly appears, from the rest, that the land is still subject to the rentcharge, though this protection is given :

B

was at one time subject to (a) a yearly rentcharge of £300 charged thereon (with other property) by the will and codicil of George Arthur Brett deceased in favour of his daughter Florence Jane Brett and her issue but with the benefit of the indemnity against such rentcharge provided by a fund in court.

That is perfectly accurate. There is, in the sense in which I have stated it, an indemnity to the benefit of which the purchaser will become entitled against the rentcharge, that indemnity being provided by the fund in court :

C

The purchaser shall accept such fund as a full and sufficient indemnity against the said rentcharge and shall not require the property sold to be released therefrom or any further or other indemnity in respect thereof or make any objection or requisition whatsoever in respect of the said rentcharge or the fund in court.

D

Now, upon that a point was raised by the purchaser, and it was raised in the observations on the reply to requisitions at a date when, having been furnished with the supplemental abstract, he had knowledge of all the facts which I have stated. He makes his observation in this form :

E

Clause 9 of the contract states that the property edged blue and green on the contract plan " was at one time " subject to a yearly rentcharge—

I pause to note that that statement is not accurate ; the contract does not say that, it says only that the blue property was subject to the rentcharge. Then he goes on to quote the words of the contract :

F

but with the benefit of the indemnity . . the supplemental abstract now delivered shows that this part of the property purchased still is subject to this yearly rentcharge, and that the fund in court referred to does not provide any indemnity against the same so far as this part of the property purchased is concerned. See [certain orders abstracted].

Pausing there : does that mean this (although, I must say, it is not very clear), that there has been no order at present made by the court discharging this land from the rentcharge ? That, I think, is what the observation means ; and that is perfectly true. But it is not true to say that the fund in court does not provide any indemnity. It does, in the sense that I have indicated, provide an indemnity ; for, in the end, the purchaser would be able to rely upon the existence of this fund to indemnify him against the operation of the rentcharge. The observation goes on :

H

The vendor is accordingly requested to procure the necessary order exonerating

this part of the property purchased from this rentcharge under the Law of Property Act, 1925, s. 50, or alternatively to allow the purchaser compensation equivalent to the expense of obtaining such an order (including any sum which may have to be paid into court or otherwise for obtaining the same) and if so required, to concur with the purchaser in obtaining the same.

- A Now, of course, it would no doubt be very convenient for the purchaser, who is apparently developing this land and wants to get his title quite clear, to have an order from the court, which can be got, in ordinary circumstances, as a matter of course, declaring this land free from the rentcharge; and I may say, incidentally, that there is an application,
- B I understand, actually before the court to-day, in another room of the building, which has been stood over for the convenience of everybody, asking for such an order; and without the slightest doubt, such an order will be made. That being so, the great controversy in this case is, of course, who is to bear the expense of obtaining that order? Because,
- C if the purchaser is right in the contention he is putting forward in this observation, that he is entitled to require the vendor to get such an order, then, of course, the costs will have to fall on the vendor. If, on the other hand, on the true construction of this contract, the purchaser has bound himself to be satisfied with the property which is theoretically
- D subject to a rentcharge, but with such an indemnity as I have indicated, then, of course, the vendor is not bound to obtain such an order, and the getting of it by the purchaser will be a luxury for which he will have to pay. That is, really, in substance, what is the point on this vendor and purchaser summons. I have already said that the observation on
- E the reply to requisitions was not quite accurate, because it stated that cl. 9 of the contract referred to both the blue and the green land, but that is not really surprising, because, in answer to the observations, the vendor seems to have fallen into the same error. The vendor's answer to the purchaser's observation is dated May 19, 1936, and is this:

- F The vendor's predecessor in title had to purchase, subject to this condition, and the purchaser was aware of this before the contract was signed. That is perfectly true; there was some discussion before the contract was signed, as to the form of the condition, and that condition was in the same form as that under which the vendor had purchased on a
- G previous occasion. The reply goes on:

- The contract provides that the purchaser shall accept the fund in court, as a full and sufficient indemnity against the rentcharge, and shall not require the property sold to be released therefrom, nor any further indemnity in respect thereof, or make any requisition in respect of the rentcharge or the fund in court.

- Now, what happened after that was this. A period of silence fell upon the matter—apparently counsel was being instructed and opinions were
- H being taken—and the next material step was this, that, on July 14, 1936, which, it will be noted, for reasons the materiality of which will appear later, was considerably more than seven days after May 19, 1936, this letter was written on behalf of the purchaser:

The only outstanding point on the requisitions is with regard to requisition No. 11

[the original requisition which led to the observation in reply]. We are now advised by counsel that cl. 9 (a) of the contract is misleading and that our client is entitled to compensation in respect thereof. Unless therefore your client is prepared to make an application to the court under the Law of Property Act, 1925, s. 50, to exonerate the land from the perpetual rentcharge of £300 per annum we propose to take out a vendor and purchaser summons on the question of our client's right under this clause. We shall be glad to hear from you as soon as possible. If your client is not prepared to take the proceedings above indicated, our client will probably institute such proceedings itself under this section contemporaneously with the vendor and purchaser summons. You will appreciate, therefore, that we cannot yet submit draft conveyance for approval, and we would only reiterate that our client is a more than willing purchaser. A

It will be noticed from that letter that there is no differentiation between the blue and the green; it is only when one comes to the summons, which was issued for the purpose, that the difference between the blue land and the green land is indicated. B

With regard to the blue land, having regard to the observations I have made, it will be clear that, in my opinion, in the circumstances, the purchaser gets, in respect of the blue land, exactly what he has agreed, by the terms of his contract, that he shall have. He has got the blue land theoretically charged with the rentcharge, but with an ample protection furnished by the existence of the fund in court. He knew, at the time that he executed the contract, that there was this rentcharge, because it is referred to; and, if he wanted to have, as part of his title, an order discharging the rentcharge, he consented to accept something less. Really, the point is that language is in fact used which was inaccurate, namely "was at one time subject." I cannot think that language confused the purchaser, because it is perfectly clear that when the clause says "was at one time subject," it means that it was at one time effectively subject, but now, having regard to the fund in court, it is not effectively charged. I do not consider that clause misleading, and, so far as the blue land is concerned, it seems to me that the summons must fail, and that the purchaser is getting the title which it was contracted he should have. C D E F

Now, with regard to the green land, the position is a little odd. By what was probably a mere slip, the special condition in cl. 9 was imposed with regard to the blue land, and nothing was said about the green land, although the green land was in the same position as the blue land. That is accounted for, probably, by the fact that there had been dealings with the green and blue land which made them pass through different hands, but, of course, the fact remains that, while the contract said nothing at all about the green land, the green land is charged with this rentcharge, though no doubt with the benefit of the indemnity. Now I conceive that, if an objection had been taken that, as regards the green land, there was no condition at all, and that the purchaser was entitled to have a perfectly clear conveyance, the position would be different from what it is now. But, in my view, on a fair construction of these requisitions and these observations, and the replies, the matter proceeded G H

upon the footing that the purchaser was content to take the matter as though the special condition related to the green land as well as to the blue ; because, if he was entitled to have an order clearing the blue land from the rentcharge, of course it was a mere question of adding a word or two to extend the order to the green land, and there was nothing in it at all. In my view, accordingly, the purchaser proceeded on the footing that he was content to have the green land and the blue land dealt with as one ; he spoke of them variously in his observations as being both comprised in the same condition, and the vendor treats them in just the same way. In so far as there was any objection put forward in regard to the green land, it appears to me that I must treat the vendor's reply to the observation as being that, in respect of the green land, the purchaser was going to get a perfectly good indemnity, and I must treat the absence of any answer for seven days as being an acceptance of that reply as satisfactory within the meaning of cl. 9 of the general conditions. In my view, after the lapse of seven days, so far as the different positions of the blue land and the green land were concerned, the reply was satisfactory ; and that, of course, is the way in which the matter proceeded. Even in the letter of July 14, there was no suggestion that these two different lands were in any different position. It was only when the matter was gone into for the purpose of settling the summons, that attention was called to that point, and a differentiation was made. Accordingly, my view is this : with regard to the blue land, the purchaser got exactly what he bargained for ; as regards the green land, he has waived any objection upon the ground that this condition, which was intended to apply, and which everybody seems to have thought, so far as I can gather from the observations, did apply to the green land, did not in fact apply to the green land. He must be treated as having waived any objection on that ground. In those circumstances, the summons fails, and is dismissed with costs.

Summons dismissed with costs.

Solicitors : *Forsythe, Kerman & Phillips* (for the applicant company) ;
Taylor & Humbert (for the respondent company).

[Reported by C. M. YOUNG, Barrister-at-Law.]

WYATT v. GUILDHALL INSURANCE CO. LTD.

[KING'S BENCH DIVISION (Branson, J.), **February 11, 1937.**]

Insurance—Motor vehicle insurance—Passenger in private car—Payment for journey—Private car policy—Compulsory third party insurance—Road Traffic Act, 1930 (c. 43), s. 36 (1). A

The plaintiff was a passenger in a motor car insured against third party risks with the defendants. The plaintiff and a friend had arranged to travel to London by train; but the owner of the car, having to go to London to give evidence, offered to take them for 25s. each. Upon the journey the car collided with a lorry. The plaintiff recovered judgment for damages and costs against the owner of the car, and then brought this action to recover the sum so awarded from the defendant insurance company, relying upon the Road Traffic Act, 1934, s. 10. The car was insured under a private motor car policy for use for social, domestic and pleasure purposes. The owner was not, so far as was known, in the habit of carrying persons for payment, and the plaintiff was a stranger to him :— B

HELD : (i) the policy did not cover the use which was made of the car on the journey in question. C

(ii) the owner of the car was not bound by Road Traffic Act, 1930, s. 36 (1) to have in force a policy of insurance to cover any liability he might incur to the plaintiff in the circumstances of this journey, which was an isolated occasion. The effect of the subsection is only to require the owner to have such a policy in force where the vehicle is habitually used for the carriage of passengers for hire or reward. D

[EDITORIAL NOTE.] Generally speaking, the provisions relating to third party insurance do not extend to persons carried in the car insured unless they are passengers carried for hire or reward. In the case of a private car, such persons are generally guests of the owner, but undoubtedly there is an intermediate class of case, of which the present is a good example, when the owner takes a stranger for a considerable journey and receives some sort of payment. The present case decides that, unless there is an habitual user of the car for the carriage of passengers for hire or reward, there is no statutory necessity for a policy covering the risk of injury to such persons, and that the ordinary private car policy does not cover such a risk. E

AS TO STATUTORY REQUIREMENTS OF POLICY, see HALSBURY, Hailsham Edn., Vol. 18, pp. 561, 562, para. 909; and FOR CASES, see DIGEST, Supp., Insurance, Nos. 3217 o-3217 y.] F

ACTION under the Road Traffic Act, 1934, s. 10, against an insurance company to recover £235 2s. 10d. damages and costs recovered against the owner of a motor car in respect of which there was a subsisting policy of insurance issued by the defendant insurance company. The action was tried upon an agreed statement of facts which are referred to in the judgment, but the following paragraph is also material : G

This was, so far as known, an isolated transaction, nor was Mr. Wilcox [the owner of the car] in the habit, so far as known, of using his car in this way; nor had he, so far as known, done so before, and up to this time the plaintiff was, so far as known, a stranger to him. H

The Road Traffic Act, 1934, s. 10, is as follows :

(1) If, after a certificate of insurance has been delivered under sect. 36 (5) of the principal Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under sect.

36 (1) (b) of the principal Act (being a liability covered by the terms of the policy is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Gilbert J. Paull for the plaintiff.

H. I. P. Hallett, K.C., and *F. Soskice* for the defendants.

BRANSON, J.: On Sept. 16, 1935, the plaintiff was a passenger in a motor car owned and driven from Dunstable to London by one Wilcox. That car was involved in an accident. Wilcox was driving and Wilcox was insured with the defendants, the Guildhall Insurance Company, Limited. The plaintiff was a passenger in the car because he and a friend of his had arranged to travel to London by train from Manchester in the afternoon of that day, but on the morning of that day Hartman had met Wilcox, who had told Hartman that he, Wilcox, was going to London and that he would take the plaintiff and Hartman to London for 25s. each. The occasion of Wilcox's visit to London was to give evidence for a friend of his who was taking his trial at the Old Bailey. The plaintiff and Hartman each paid Wilcox 25s. before they set forth, and this journey brought Wilcox into collision with a lorry in which the plaintiff received an injury. The plaintiff then brought an action against Wilcox and the driver of the other vehicle with which Wilcox's car had collided, and in Jan., 1936, the plaintiff recovered judgment against Wilcox for £78 and costs, and there was also a judgment against the plaintiff in respect of the costs of the other man Woodcock, which were ordered to be paid by Wilcox. These items amounted to the sum of £235 2s. 10d., for which there is now judgment in favour of the plaintiff against Wilcox, which judgment is wholly unsatisfied. Thereupon Wilcox claimed to be indemnified by the defendants, the insurance company; they disputed the claim and denied that they were under any obligation to indemnify him, but now some of the grounds upon which they took up that attitude have disappeared, and the only ground upon which the defendants say they need not indemnify Wilcox is that the policy did not apply to cover the user of the car in the way in which Wilcox was using it.

The plaintiff brings this action against the defendants under the Road Traffic Act, 1934, and in order to recover, the plaintiff must show, first of all, that Wilcox was entitled to be indemnified under the policy in respect of liability to him arising out of the accident and, secondly, he must show that the circumstances were such that Wilcox was under obligation, under the Road Traffic Act, 1930, s. 36, to have in force a policy covering injury which might be sustained by the plaintiff caused by or arising out of the use of that car upon the road. So that

really there are two questions in the case, the first of which depends upon the statute and the second of which depends upon the policy. Mr. Paull in his very ingenious argument says that in the circumstances the plaintiff was a passenger in this car for reward and yet that the car was not excluded from the cover of the policy because it was not being used for hiring purposes. If he makes good that argument, the plaintiff succeeds. Mr. Hallett, on the other hand, contends that the two positions are really mutually inconsistent; if the circumstances were such as to bring down upon Wilcox the obligation under sect. 36 of the Act of 1930 to have a policy to cover a passenger, that fact must exclude Wilcox from cover under the policy issued by the defendants. A B

The matter turns on quite a few expressions in two documents, and I must refer to them. To take the policy first, it is a policy in which Wilcox is covered in respect of this car for :

use for social domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in the schedule hereto, excluding use for hiring commercial travelling racing pacemaking speed-testing the carriage of goods or samples in connection with any trade or business and use for any purpose in connection with the motor trade. C

Under the general exceptions, if the car is being used otherwise than in accordance with the description of use, then the policy does not cover it. It appears from the statement of facts that Wilcox was not in the habit, so far as is known, of using his car to carry passengers for payment, to use a neutral term, and it is also stated that up to this time the plaintiff was, so far as is known, a stranger to him. I think that the question of the interpretation of the policy turns really upon whether or not one can say that the word "hiring" in the description of use has got to receive a strict and restricted meaning so that it would not apply to the carrying of a person for reward. It is quite true that, if you apply an absolutely strict construction to it, a person does not hire a vehicle in which he is conveyed for payment from one place to another, to which that vehicle would be going in any event, but I think one must bear in mind the known position with regard to the liability of persons using cars to procure that passengers should be covered. I do not think it is right to read this policy, which is a policy issued in order to come within the terms of the statute, without looking at the statute with reference to which it has been issued. If the argument which is put forward by Mr. Paull is sound, it seems to me that this motor policy, which is called a private motor car policy and covers use for social, domestic and pleasure purposes, might well be extended to cover the case of a person who, for his own pleasure and because he liked driving and liked making a little money, ran his car habitually from London to Brighton on fine days and took fees from people to be conveyed in that car. That would not be a hiring, and unless it could be said that once you get payment for carrying people in your vehicle D E F G H

the words "use for social, domestic and pleasure purposes" exclude the vehicle from the policy, that result would follow. I do not think it can possibly have been intended, either by Wilcox or by the insurance company, that any such user should be permitted under the policy.

- A It seems to me that this policy, which is intended to be cover for a private motor car, is, by the words in the exclusion clause, coupled with the words at the beginning of the description of use clause, keeping the indemnity confined to the car while it is being used for social, domestic and pleasure purposes, that is to say, in the class wherein the persons being conveyed in the vehicle are not in a position to make claims against the insurance company. So it appears to me that though the word used in the exclusion clause is "hiring," it would be wrong to hold that the car, whilst being used by Wilcox in the way in which it was being used when he was for a monetary consideration conveying two passengers from Manchester to London, was being used for "social, domestic and pleasure purposes" and not for "hiring." Whether one treats it as a case in which the use of the car for the purpose of taking two people to London for a consideration takes the user out of the words "use for social, domestic and pleasure purposes," or whether one takes the view, seeing that the proposal form is a proposal for an insurance under class 1, which means paying a lesser fee than would be required if the car was used for business or trade purposes and which would be smaller still than the premium under class 3 which does not exclude hiring, that "hiring" is intended to include use for a money payment, I think the same result follows. I read the "description of use" as a whole, and I have formed the opinion that it does not cover the case of a car which is being used to convey people for payment from one place to another, even though the owner of the car might have been intending to take the same journey by himself, and having the opportunity of making a little money by carrying somebody else, he took it. In my view, therefore, this action must fail upon that ground. I think the user of the car was not within the policy.

- That makes it unnecessary for me to decide the other ground which seems to me to be a little more difficult, but as the matter has been argued it may be right that I should express an opinion about it. It depends upon the statute and it arises in this way: The plaintiff, under the Road Traffic Act, 1934, s. 10, gets his right to sue the defendants only if the position is such that under sect. 36 of the Act of 1930 Wilcox was bound to have a policy of insurance which would cover him for this journey in the car. The section to be construed is sect. 36 of the Act of 1930, which says, in subsect. (1):

In order to comply with the requirements of this part of this Act, a policy of insurance must be a policy which . . . (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be

incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road—

that is to say, which insures Wilcox against any liability which he may incur in respect of an injury to any person caused by or arising out of the use of the vehicle on a road. Then comes proviso (i) which deals with matters with which I am not concerned, and then proviso (ii) reads as follows :

Provided that such a policy shall not be required to cover (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise.

It is said, upon the one hand, that the change in the use of the language, the exception speaking of a vehicle in which passengers "are" carried and the proviso apart from the exception speaking of persons "being" carried, indicates that the exception is dealing with a vehicle which is normally or habitually used for the carriage of passengers for hire or reward. I may say in passing that the use of the words "hire or reward" there in this way would seem perhaps to help in the construction which I have put upon the policy because there really can be no distinction to be drawn between persons who are being carried for hire or carried for reward. "Carried for hire," of course, is something different from "hiring," and I fail to see how the legislature can be thought to have drawn any distinction between "hire" or "reward," and one sees, therefore, the words being used almost as synonymous in the Act, which might lead to the use of the word "hiring" alone being found in the description of use. However, that is a digression. Whichever way you read this rather curiously worded proviso, difficulties seem to arise. If it means what Mr. Paull contends it means, the words "liability in respect of the death," etc., "of persons being carried in" and so forth "unless they are being carried for hire or reward," would have covered the intention without the rather clumsy exception coming at the beginning of the proviso. If the contention which is urged by Mr. Paull is the correct one, if anybody takes a passenger in his car for anything which may be called a reward, he immediately becomes liable to penalties if he has not got a policy which covers that person. It seems to me that this subsection is really dealing with vehicles which are normally or habitually used in the way in which the exception mentions, and the mere fact that upon one isolated occasion a man takes some reward—it need not even be a monetary reward—for the conveyance of a passenger in his car, is not intended to render him liable to penalties if he has not got a policy which covers that passenger on that occasion. After all, this is a statute which is imposing penalties, and if there are two constructions possible it is right to adopt the one which does not turn the user of the car into a criminal user. It is possible, I think, to see, as Mr. Hallett

says, in the form of the language used, the distinction between the liability in respect of "persons carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence," which is obviously directed to the moment of the accident, and the case of a vehicle in which passengers "are carried for hire or reward." The words at the commencement of the proviso, "except in the case of a vehicle in which passengers are carried," cannot be read with the words "at the time of the occurrence;" and that being so, I think one must read the exception as a clause by itself and as not joined up to the language at the end of the proviso, "at the time of the occurrence of the event out of which the claims arise." The effect is then that, unless this is a vehicle in which passengers "are carried for hire" in the sense in which one would generally use that kind of expression, as, for instance, "a house in which parties are given" or "a shop in which umbrellas are kept," that is to say habitually given or kept, I think the proviso applies without the exception and, consequently, upon this ground also the plaintiff would fail. The result is that, in my opinion, the defendants are entitled to judgment with costs.

Solicitors: *Stanley & Co.*, agents for *Leslie Weinberg*, Manchester (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law.]

HURT v. BOWMER.

[CHANCERY DIVISION (Bennett, J.), January 19, 20, 21, 22, 1937.]

Easements—Right of way—"As at present enjoyed."

The plaintiff's predecessor conveyed to the defendant a certain field of which the defendant was tenant, and granted to him as a means of access to the field a right of way "as at present enjoyed" over a drive which passed through the vendor's property. The field had been used mainly for agricultural purposes and to a small extent as a camping ground. After the conveyance, the number of people using the field for camping and consequently passing over the drive increased considerably. In an action for a declaration that the defendant was not entitled to use the drive so as substantially to increase the burden of the easement over the drive by altering its character, nature or extent:—

HELD: the words "as at present enjoyed" had no reference to the purposes for which the defendant was using the field nor to the quantity of the user, but referred to the quality of the user, i.e., on foot, with horses and with vehicles, by the defendant at the time of the conveyance.

[EDITORIAL NOTE. Changes in means of locomotion and the development of land continually change the nature and extent of the user of a right of way. The present case shows that in a grant of a right of way "as at present enjoyed" the quoted words only refer to the type of locomotion referred to in the grant and not to the extent of the user within the permitted types.

AS TO CONSTRUCTION OF GRANT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 324-326, paras. 575-577; and FOR CASES, see DIGEST, Vol. 19, p. 97, Nos. 601-607.]

ACTION for, *inter alia*, a declaration that the defendant, his agents, and licensees were not entitled to use any part of a certain drive which passed over the plaintiff's land, as a means of access to a field belonging to the defendant for the use thereof as a camping ground or otherwise so as substantially to increase the burden of an easement over the drive by altering its character, nature or extent as the same was enjoyed immediately before Nov. 8, 1930.

By a conveyance dated Nov. 8, 1930, the field, which was at that time being used and at all material times previously had been used mainly for agricultural purposes and to a small extent as a camping ground, was conveyed to the defendant by the plaintiff's predecessor, the conveyance containing a grant of an easement in the following terms :

A right of way as at present enjoyed over the adjoining property of the vendor . . . as a means of access

to the field in question. The defendant had been in occupation of the field as tenant from 1920 until the date of the conveyance. During 1934 and 1935 the number of campers allowed by the defendant to make use of the field for camping, and consequently passing over the plaintiff's drive, increased considerably.

The case is reported only upon the question of the meaning of the words "as at present enjoyed" contained in the conveyance of Nov. 8, 1930.

W. Cleveland-Stevens, K.C., and C. R. R. Romer for the plaintiff.
Gerald Upjohn for the defendant.

BENNETT, J. : The question is to what extent the general right is restricted or limited because of the use in the grant of the words "as at present enjoyed." Have these words—and this is the question as I understand it—the same meaning as "as at present used?" If they mean "as at present used," it would be necessary to find out exactly what the user was which the defendant made of the way in question during the years of his tenancy preceding the date of the grant. But I think that if the intention of the grantor, the plaintiff's predecessor, was to restrict and limit the defendant to a user for agricultural purposes, he ought to have made that clear, and he certainly has not done so. "As at present enjoyed," in my judgment, is a phrase which has no reference in the circumstances to the purposes for which the defendant was using the field. He is not tied down by any covenant restricting the user of the field, and, in my view, the words have reference to the quality of the user which the defendant was enjoying over the way at the time of the grant; that is to say, he was using the way on foot, he was using it with horses, and he was using it with vehicular traffic, and, in my judgment, that is what is meant by enjoyment in the terms of the grant. On that view of the true construction of the deed the

A plaintiff is unable to complain merely because not the quality but the quantity of the user is increased. As the quality of the user which is taking place to-day differs in no respect from the quality of the user which was taking place before Nov. 8, 1930, in my judgment the plaintiff's claim that the defendant is exceeding his rights of way granted to him by the deed of Nov. 8, 1930, fails.

Solicitors: *Taylor, Jelf & Co.*, agents for *Randolph Eddowes & Co.*, Derby (for the plaintiff); *Gibson & Weldon*, agents for *Percy R. Pym*, Belper (for the defendant).

B [Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

C CITY FUR MANUFACTURING COMPANY, LTD. v.
FUREENBOND (BROKERS) LONDON, LTD.

KING'S BENCH DIVISION (Branson, J.), **January 29, 1937.**

Sale of Goods—Transfer of title—Pledge by vendor in possession—Possession of agent—Warehouseman—Sale of Goods Act, 1893 (c. 71) s. 25 (1).

D L. & Co. held certain furs in its warehouse which were the property of H. subject to the payment of £178 0s. 6d., its charges in respect of them. H. sold these furs to the plaintiffs who gave him a bill of exchange for the price on the representation that he would pay off L. & Co. and obtain delivery orders for the plaintiffs. Instead of doing this, he arranged to pledge them with the defendants for the sum of £178 0s. 6d. The defendants, on Aug. 21, 1936, drew a cheque for that amount in favour of L. & Co., and that cheque was cleared on Aug. 22. L. & Co. then received an order from H. to deliver the furs to the defendants, which was done. The defendants, who had no notice of the plaintiffs' title, contended that by virtue of Sale of Goods Act, 1893, s. 25 (1), they were entitled to hold these furs as if delivery to them had been expressly authorised by the plaintiffs:—

F HELD: the furs after L. & Co. had been paid the £178 0s. 6d. by the defendants were in the possession of H. as vendor in possession, and there was a disposition or pledge of them by H. to the defendants. They were entitled to hold the furs under this pledge and the claim of the plaintiffs for delivery to them failed. The word "possession" in the Sale of Goods Act, 1893, s. 25 (1), must be construed with reference to the Factors Act, 1889, s. 1 (2), and includes possession by another person on behalf of the person whose possession is material and it was immaterial that the agreement of pledge was made before the transfer of the furs could be carried out.

G [EDITORIAL NOTE. This case may be usefully compared with *Union Transport Finance, Ltd. v. Ballardie*, [1937] 1 All E.R. 420, where the Factors Act, 1889, s. 8, was relied on. In the present case the decision is based upon the Sale of Goods Act, 1893, s. 25 (1). The transaction in each case is a disposition by the vendor in possession, but in the present case the vendor is in possession only by an agent—a warehouseman to whom he owes charges upon the goods.

H AS TO SALE BY VENDOR IN POSSESSION, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 191, 192, para. 339, and FOR CASES, see DIGEST, Vol. 39, p. 535, No. 1461 and Supp.]

ACTION for damages for conversion of a quantity of furs alleged to be the property of the plaintiff. The defendants relied upon the Sale of Goods Act, 1893, s. 25 (1), and an alleged disposition to them by a vendor in possession.

G. O. Slade and *C. F. J. Baron* for the plaintiffs: The facts do not fall within the Sale of Goods Act, 1893, s. 25 (1), for two reasons. First, the suggested vendor in possession was never in fact in possession of the goods. He was only the owner of the property in them. At all material times the goods were in the possession of warehousemen subject to a lien for charges and money paid. Secondly, if Herman was a vendor in possession he was not able to make a title until Aug. 22, when the warehouse charges and other moneys had been paid, and the purported pledge of the goods took place on Aug. 21.

H. U. Willink, K.C., and *P. B. Morle* for the defendants: Herman had possession through his agent who held for him subject to his lien and Herman could at all times have dealt with the possession of the goods upon making provision for the discharge of that lien.

The Sale of Goods Act, 1893, s. 25 (1) provides:

25.—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

BRANSON, J: This case raises quite a short point, and there is really no dispute about the actual facts with regard to it. One Herman, bought certain lots of furs at a sale which was held on Feb. 10 by Messrs. Huth. He bought seven parcels, and Messrs. Huth, who were acting as brokers and auctioneers between purchasers and the owners of the goods at this sale, rendered to Herman under date Feb. 10 a broker's contract note showing that they had that day bought for him at this public sale the seven parcels of goods in question. Having become the purchaser of the goods, Herman did not desire to pay for them all at once. The prompt day was Mar. 4, by which time the sellers had to be paid, and by which time Herman ought to have paid for the goods, but not intending to pay for them all by that time, he availed himself of a practice which exists among the auctioneers and brokers in the fur trade, under which the broker pays the vendor upon the prompt day, and, subject to such arrangements as he may make or care to make with the purchaser, he advances a part of the purchase price for the purchaser, who is thus enabled to delay payment for a certain time. In the meantime the auctioneers hold the goods in the warehouse subject to the payment by the purchaser of the amount which they have advanced on his behalf in order to satisfy the vendor. That was the position as

between Herman and Messrs. Huth, who subsequently became C. M. Lampson & Co., Ltd.

A In the meantime, on Mar. 2, Herman sold certain of these skins to the plaintiffs and received in payment for them bills of exchange payable in July and August. Some of the goods so sold were taken up, and no question arises about them ; but the rest of the goods remained in the warehouse of C. M. Lampson & Co., Ltd., subject to the arrangement which I have already detailed.

B On July 1, Herman made a further sale of the rest of the skins to the plaintiffs, and again got a bill of exchange in payment for them. Herman persuaded the plaintiffs to give to him that bill of exchange upon the representation that he would use it to clear the skins of the amount which he owed to Lampsons, so that the plaintiffs could get delivery of them on presentation of the delivery orders to Lampsons ; but he did not do it. Instead of doing it, he went to the defendants and explained to them that he wanted to borrow money on these skins, which were his property, lying in Lampsons' warehouse subject to a claim by Lampsons of £178 ; he got the defendants to advance him the money to pay off Lampsons in order that the skins might be delivered by C D Lampsons to the defendants and held by the defendants as pledges for the amount that they have advanced, or that they were going to advance, to Herman. That transaction was carried out. The defendants drew a cheque on Aug. 21 in favour of C. M. Lampson & Co., Ltd., for £178 0s. 6d., and that cheque was cleared upon Aug. 22. Upon that date, therefore, E Lampsons had been paid all that they were entitled to get in respect of these skins, and they held the skins to the order of Herman. But Lampsons quite rightly, would not deliver the goods to the defendants until a proper order from Herman was produced and shown to them. That was done, and acting upon that order they delivered the skins to the F defendants, who now hold them, and claim to do so as pledges against the £178 which they have advanced to Herman.

The plaintiffs allege that the skins are theirs, having passed to them by virtue of the two contracts of sale of Mar. 2 and July 1, and they say : " We have paid for these skins and they are our property," and so G they are ; but the question is whether, by virtue of the Sale of Goods Act, s. 25 (1), the defendants are or are not entitled to hold the skins as though the delivery to them had been expressly authorised by the plaintiffs. That, I think, depends upon whether, in the circumstances of this case, the defendants bring themselves within the language of H sect. 25 (1) of the Act. I think they do. The section says : " Where a person having sold goods"—that is, Herman—"is in possession of the goods"—Mr. Willinck says that Herman, if not all through, at all events after Aug. 22, was in possession of these goods ; and that depends upon what is the true interpretation to be put upon the word " possession."

I think it is perfectly plain by a reference to the Factors Act, 1889, s. 1 (2), that it is sufficient in that Act that possession is possession by another person on behalf of the person whose possession is material, and I see no reason why the same kind of construction should not be put upon the words "in possession of the goods" in sect. 25 (1) of the Act of 1893. A Possession by an agent, possession by a warehouseman or mercantile agent, is a perfectly well known form of possession in the business world, and I can see no reason for confining the meaning of it to personal possession or actual possession of the person who has sold the goods. These goods, until Herman sold them to the plaintiffs, were Herman's B goods. They were in possession of Lampsons subject to this arrangement under which at any moment Herman could get them by paying that which he owed upon the goods, and I think it would be true to say that they were in his possession from the beginning, because they were held for him or upon his behalf by Lampsons. It is true that that was subject C to his discharging his part of the bargain by virtue of which they were being so held, but none the less, they were held on his behalf. At any moment, as I say, he could pay the £178, and then they would deal with the goods as he ordered; but at all events when they had got his £178 on Aug. 22, they held the goods for him and subject to his control, and D upon his behalf, and I think that he was a person having possession of the goods which he had sold the plaintiffs. The first part of subsect. (1) is therefore satisfied.

Then the question is: Was there a delivery or a transfer by him of those goods under any sale, pledge, or other disposition? I think it E cannot be doubted that there was. He had contracted that if the defendants would pay the £178 to clear the debt upon those goods they should have the goods under disposition or pledge, and that was carried out by his orders, and it was when Lampsons got his order to hand those goods over to the defendants that the defendants got them. I F think that constituted a transfer by him of the goods under this contract of pledge. The mere fact that the contract was made before the transfer could be carried out does not seem to me to affect the matter one way or the other.

For those reasons I think that in this case, in which one of two innocent G parties has to suffer for the fraud of the third, it is the plaintiffs who have to suffer and not the defendants, and I enter judgment for the defendants with costs.

Solicitors: *Herbert Baron & Co.* (for the plaintiff company); *Sutton, Ommanney & Oliver* (for the defendant company). H

[Reported by GERALD ABRAHAM, Esq., Barrister-at-Law.]



